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In the First Series,
[1954] Ch. [1954] P.
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TABLE OF CASES REPORTED

IN THIS VOLUME

A PAGE

Ammar *v.* Ammar - - 468
Assunzione, The - - - 150

B

Baker *v.* Baker - - - 33
Barber *v.* Barber - - - 438
Bright *v.* Bright - - - 270

C

Cotton *v.* Cotton - - - 305

D

Dyson *v.* Dyson - - - 198

E

Eastland *v.* Eastland - - 403

F

Foster *v.* Foster - - - 67
Furtado, Sapsford and, Sapsford *v.* - - - - 394

G

Galler *v.* Galler - - - 252
Galloway *v.* Galloway - - 312
Gore-Booth *v.* Gore-Booth - 1

H

H. *v.* H. - - - - 258
Hill *v.* Hill - - - - 291

K

King *v.* King - - - 55
Kinnane *v.* Kinnane - - 41

L PAGE

Lapford (Devon) Parish Church, *In re* - - - 416

M

McLellan *v.* McLellan - - 138
Maldonado, decd., In the Estate of. State of Spain *v.* Treasury Solicitor - - 223
Manchester Ship Canal Co., Stonedale No. 1 (Owners) *v.* The Stonedale No. 1 - 338

P

Packer *v.* Packer - - - 15
Padley *v.* Padley - - - 302
Park, decd., In the Estate of. Park *v.* Park - - 89
Pike *v.* Pike - - - - 81n.

R

Roberts *v.* Roberts - - 472

S

S. (D. A.) *v.* S. (J. D.) - 194
St. Mary, Tyne Dock, *In re* - 369
Sapsford *v.* Sapsford and Furtado - - - - 394
Self *v.* Self - - - - 480
Skull *v.* Skull - - - 458
Spain, State of *v.* Treasury Solicitor. In the Estate of Maldonado, decd. - - 223
Spalenkova *v.* Spalenkova - 141

PAGE

Stanga *v.* Stanga - - - 10
Starkey *v.* Starkey - - 449
Stonedale No. 1 (Owners) *v.* Manchester Ship Canal Co. The Stonedale No. 1 - - 338
Stransky *v.* Stransky - - 428
Style *v.* Style and Keiller - 209

T

Thomson *v.* Thomson and Whitmee - - - - 384
Treasury Solicitor, State of Spain *v.* In the Estate of Maldonado, decd. - - 223

W

W. *v.* W. (No. 2) - - 486
Watson *v.* Watson - - 48
West *v.* West - - - 444
Whitmee, Thomson and, Thomson *v.* - - - 384
Wyatt *v.* Wyatt - - - 26

TABLE OF CASES CITED AND JUDICIALLY NOTICED

ABBREVIATIONS

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

			PAGE
Adriatic, The	[1931] P. 241	*R.*	192
Alhadeff *v.* Alhadeff	[1951] W.N. 367	*R.*	465
Allen *v.* Allen	[1951] 1 All E.R. 724	*R.*	39, 40
Allen *v.* Allen	[1951] W.N. 322	*Appl.*	271, 280, 288
Allen *v.* Allen	[1951] W.N. 322	*E.*	444–8
Altofts, *In re* the Parish of	(Unreported, 1941)	*R.*	423, 424
Altofts, *In re* the Parish of	(1941, unreported)	*F.*	369, 377
Anon.	Dea. & Sw. 295	*R.*	442, 443
Assunzione, The	[1953] 1 W.L.R. 929	*Aff.*	151
Athelvictor, The	[1946] P. 42		342
Bacon *v.* Bacon and Bacon	2 Sw. & Tr. 86	*R.*	213
Baldwin *v.* Baldwin	The Times, July 30, 1919	*R.*	125
Baker *v.* Baker	[1950] W.N. 29	*R.*	47
Banbury Peerage Case	1 Sim. & St. 153	*R.*	310
Bank voor Handel en Scheepvaart N.V. *v.* Slatford	[1953] 1 Q.B. 248		225
Barker *v.* Barker	[1949] P. 219	*C.*	67, 75, 79
Barnard *v.* Barnard	(1952, unreported)		203
Barnard *v.* Barnard	(Unreported, Nov. 18, 1952)	*R.*	89
Barnett's Trusts, *In re*	[1902] 1 Ch. 847	*Dist.*	224, 227, 232, 242, 245, 247, 250
Barraclough *v.* Brown	[1897] A.C. 615		341
Bater *v.* Bater	[1951] P. 35		407
Baxton *v.* Eckersley	[1950] 1 K.B. 480	*R.*	457
Beale *v.* Beale	[1951] P. 48		407
Bednall *v.* Bednall	[1927] P. 225		17
Bednall *v.* Bednall	[1927] P. 225	*R.*	325–8, 330, 336
Bell *v.* Graham	13 Moo.P.C. 242		262
Benson *v.* Benson	[1941] P. 90	*R.*	31
Bishop of Oxford *v.* Henly	[1907] P. 88; [1909] P. 319	*R.*	372, 421, 422, 425
Bishop Sumner *v.* Wix	L.R. 3 A. & E. 58	*R.*	379, 380
Blackborne *v.* Blackborne	L.R. 1 P. & M. 563	*R.*	442
Boileau *v.* Rutlin	2 Exch. 665	*R.*	92
Boughton *v.* Knight	L.R. 3 P. & M. 64	*R.*	97, 120, 131, 135
Bowron *v.* Bowron	[1925] P. 187	*R.*	504, 508
Boyd *v.* Boyd	[1938] W.N. 336		408
Brabo, The	[1948] P. 33; [1947] 2 All E.R. 363	*R.*	355, 368
Brammer *v.* Brammer	[1954] 1 W.L.R. 599	*R.*	478
Bright *v.* Bright	[1953] 3 W.L.R. 659		445
Bright *v.* Bright	[1954] P. 270	*C.*	292, 297, 300
Brodie *v.* Brodie	[1917] P. 271, 273	*R.*	267
Bromage, *In re*	[1935] Ch. 605	*Appl.*	305, 310
Browning *v.* Reane	2 Phill.Ecc. 69	*R.*	98, 122, 126, 136
Buchler *v.* Buchler	[1947] P. 25	*R.*	76
Buchler *v.* Buchler	[1947] P. 25		407
Burdett *v.* Thompson	L.R. 3 P. & M. 72n.	*R.*	97, 121, 132, 133, 135
Burnett *v.* Burnett and Purdy	39 T.L.R. 111	*Appl.*	10, 14

Butland *v.* Butland	29 T.L.R. 729	*R.*	299
Cairnbahn, The	[1914] P. 25	*R.*	353
Capel St. Mary, Suffolk *v.* Packard	[1927] P. 289	*Appl.*	369, 375, 379, 380, 417, 422, 424, 425
Carroll, *In re* (No. 2)	[1931] 1 K.B. 317		17
Casey *v.* Casey	[1949] P. 420		491
Chapman *v.* Chapman	[1954] A.C. 429	*Dist.*	384, 392, 393
Chartered Mercantile Bank of India, London and China *v.* The Netherlands India Steam Navigation Co. Ld.	10 Q.B.D. 521	*R.*	168, 169, 189
Chr. Knudsen, The	[1932] P. 153		341
Churchman *v.* Churchman	[1945] P. 44	*R.*	256
Cohen *v.* Cohen	[1940] A.C. 631	*Appl.*	486, 487, 498, 504, 507–10, 512, 516, 517, 519
Cole *v.* Cole	5 Sneed's Tenn. Rep. 56	*R.*	125, 132
Colquitt *v.* Colquitt	[1948] P. 19	*R.*	22
Colquitt *v.* Colquitt	[1948] P. 19	*C.*	312, 317, 319, 327–30, 337
Cooper *v.* Cadwalader	5 T.C. 101		431
Cooper *v.* Cooper	[1953] P. 26	*Appr.*	56, 58, 60, 66
Cooper *v.* Cooper	L.R. 7 H.L. 53		236
Cooper *v.* Crane	[1891] P. 369		225, 263
Countess, The	[1921] P. 279; [1922] P. 41; [1923] A.C. 345	*R.*	348, 354–6, 362, 368
Cox *v.* Cox	[1952] 2 T.L.R. 141		407
Craig *v.* Kanssen	[1943] K.B. 256		143
Crowther *v.* Crowther	[1951] A.C. 723		492
Crystal, The	[1894] A.C. 508	*R.*	353, 359
Curtis *v.* Curtis	1 Sw. & Tr. 192		20
Dalrymple *v.* Dalrymple	2 Hag.Con. 54		264
Davey *v.* Hinde	[1901] P. 95; [1903] P. 221	*R.*	375, 421, 422, 425
Dee Conservancy Board *v.* McConnell	[1928] 2 K.B. 159	*C.*	339, 350, 352, 360–2, 367
Dexters Ld. *v.* Hill Crest Oil Co. (Bradford) Ld.	[1926] 1 K.B. 348	*R.*	457
Dick *v.* Piller	[1943] K.B. 497	*R.*	483
Dixon *v.* Dixon	[1953] P. 103		72
Dixon *v.* Dixon	[1953] P. 103	*Dist.* *C.*	271, 281, 285, 286 292, 297–9
Dodworth *v.* Dale	[1936] 2 K.B. 503		491
Drew *v.* Drew	13 P.D. 97		490
Durham *v.* Durham	10 P.D. 80	*R.*	98, 99, 123, 136
Dyke *v.* Walford	5 Moo.P.C. 434		233
E. *v.* E. (sub nom. Elwes *v.* Elwes)	[1950] P. 232		491
Eaves, *In re*	[1940] Ch. 109		491
Edwards *v.* Edwards	[1948] P. 268		408
Edwards *v.* Edwards	[1950] P. 8	*R.*	281, 285
Edwards *v.* Edwards	[1950] P. 8	*C.*	67, 75, 79
Ella, The	[1915] P. 111	*R.*	362
Elphinstone *v.* Purchas	L.R. 3 A. & E. 66	*R.*	379
Elwes *v.* Elwes	1 Hagg.Con. 269		398
Enohin *v.* Wylie	10 H.L.C. 1	*R.*	225
Evans *v.* Evans	1 Hagg.Con. 35	*Appl.*	403, 415
Evans *v.* Evans and Blyth	[1904] P. 274	*R.*	337
Everitt *v.* Everitt	[1949] P. 374	*R.*	39, 447
Express, The	L.R. 3 A. & E. 597		154
Fairman *v.* Fairman	[1949] P. 341	*C.*	252, 255, 257, 258
Fender *v.* St. John-Mildmay	[1938] A.C. 1	*Dist.*	487, 512–4, 517, 518
Field's Marriage Annulling Bill	2 H.L.C. 48	*R.*	267

Finney *v.* Finney	L.R. 1 P. & M. 483	*R.*	284
Ford *v.* Stier	[1896] P. 1		263
Forster *v.* Forster	39 T.L.R. 658	*R.*	124
Foster *v.* Foster	[1954] P. 67	*Dist.*	271, 286, 287
Fulwood's Case, Lady	Cro.Car. 482	*R.*	266
G. *v.* M. (sub nom. Gordon *v.* Merricks)	10 App.Cas. 171; 1 T.L.R. 326	*R.*	495
Gavagan, *In re*	[1922] 1 I.R. 148		17
Gibbs *v.* Gibbs	[1952] P. 332	*R.*	470
Giles *v.* Giles	[1900] P. 17	*Appl.*	10, 14
Ginesi *v.* Ginesi	[1948] P. 179	*R.*	255, 256
Glenister *v.* Glenister	[1945] P. 30	*Appl.*	34, 35, 38
Goldsmiths' Company *v.* Wyatt	[1907] 1 K.B. 95		315
Gordon *v.* Gordon	[1903] P. 141	*Appl.*	48, 53, 54
Gore-Booth *v.* Bishop of Manchester	[1920] 2 K.B. 412		372
Gore-Booth *v.* Bishop of Manchester	[1920] 2 K.B. 412	*R.*	421
Great Northern, Piccadilly and Brompton Railway *v.* Attorney-General	[1909] A.C. 1		342, 359
Green *v.* Green	[1929] P. 101		17
Green *v.* Green	[1929] P. 101	*R.*	51, 318, 325, 327–30, 336
Green *v.* Green	[1946] P. 112		493
Griffith *v.* Griffith	[1944] I.R. 35	*R.*	267
Hanley, *In re*	[1942] P. 33	*R.*	232
Harbin *v.* Gordon	[1914] 2 K.B. 577	*R.*	470
Harriman *v.* Harriman	[1909] P. 123	*R.*	46, 284, 295, 462
Harriman *v.* Harriman	[1909] P. 123	*Appl.*	487, 509, 511, 516
Harrison *v.* Harrison	[1951] P. 476	*Appr.*	15, 20, 26, 312, 317, 319, 328–30, 333, 338
Hasting *v.* Hasting	[1948] P. 68		216
Heath *v.* Heath	[1950] P. 193	*Dist.*	141, 147
Henderson *v.* Henderson	3 Hare 100	*R.*	282
Herod *v.* Herod	[1939] P. 11	*R.*	463, 517
Hopkins *v.* Hopkins	[1951] P. 116	*Dist.*	429, 436
Horton *v.* Horton	[1940] P. 187		407
Hoystead *v.* Commissioner of Taxation	[1926] A.C. 155	*Appl.* *R.*	271, 282, 288 297
Hudson *v.* Hudson	[1948] P. 292	*Dist.* *R.*	270, 283 300
Humphries *v.* Humphries	[1910] 1 K.B. 796		92
Hunt *v.* Hunt	Dea. & Sw. 121		398
Hunter *v.* Edney	10 P.D. 93	*R.*	99, 100, 111, 124, 130, 135
Hussein (orse. Blitz) *v.* Hussein	[1938] P. 159		263
Hutchinson *v.* Hutchinson	[1951] P. 272		492
Hyde *v.* Hyde and Woodmansee	L.R. 1 P. & M. 130		262
Igra *v.* Igra	[1951] P. 404		143
Industrie, The	[1894] P. 58	*R.*	171, 173, 191–3
Inland Revenue Commissioners *v.* Lysaght	[1928] A.C. 234	*R.*	435, 436
Jackson (orse. Macfarlane) *v.* Jackson	[1908] P. 308	*R.*	124, 325
Jamieson *v.* Jamieson	[1952] A.C. 525	*Dist.*	403, 412
Jenion, *In re*	[1952] Ch. 454		306
Jinks *v.* Jinks	[1936] 3 All E.R. 1051	*R.*	452, 456
Johnson *v.* Johnson	[1900] P. 19		475
Jones *v.* Jones	45 T.L.R. 292		17
Jones *v.* Jones	45 T.L.R. 292	*R.*	326–8, 330, 336
Kay *v.* Kay	[1904] P. 382	*Appl.*	487, 509, 514
Kaslefsky *v.* Kaslefsky	[1951] P. 38	*Appl.*	403, 413, 414, 416

Kelly *v.* Kelly	L.R. 2 P. & M. 59	*R.*	412
Kensit *v.* St. Ethelburga, Bishopsgate Within	[1900] P. 80	*R.*	375
Kensit *v.* St. Ethelburga, Bishopsgate Within	[1900] P. 80	*R.*	421
King *v.* King	[1953] A.C. 124		56, 407
King *v.* King	[1953] 3 W.L.R. 433	*Aff.*	56
Langworthy *v.* Langworthy	11 P.D. 85	*R.*	21, 25
Langworthy *v.* Langworthy	11 P.D. 85	*C.*	312, 318, 320, 324–6, 328, 329, 332, 335
Lauder *v.* Lauder	[1949] P. 277	*Dist.*	403, 413, 414
Leaver *v.* Torres	43 S.J. 778	*Appl.*	10, 14
Levene *v.* Inland Revenue Commissioners	[1928] A.C. 217	*R.*	435
Lindsay *v.* Lindsay	[1934] P. 162	*Dist.*	48, 51
Lloyd *v.* Guibert	L.R. 1 Q.B. 115	*R.*	166–9, 176, 188–91, 193
Lorriman *v.* Lorriman and Clair	[1908] P. 282	*R.*	213, 214
Lowry *v.* Lowry	[1952] P. 252		432
Luccioni *v.* Luccioni	[1943] W.N. 42; [1943] P. 49	*C.*	141, 145, 146, 149
Lynch *v.* Lynch	[1939] P. 355		492
M. *v.* M.	[1946] P. 31		17
M. *v.* M.	[1946] P. 31	*R.*	319, 326–8, 334, 337
Macrae *v.* Macrae	[1949] P. 397	*R.*	437
Manning *v.* Manning	L.R. 2 P. & M. 223		432
Manser *v.* Manser	[1940] P. 224		492
March *v.* March and Palumbo	L.R. 1 P. & M. 440		216
Markham *v.* Shirebrook Overseers	[1906] P. 239		374
Marsh *v.* Marsh	1 Sw. & Tr. 312		20
Martens *v.* Martens	[1952] 3 S.A.L.R. 771	*C.*	259, 268, 269
Martin *v.* Mackonochie	L.R. 2 P.C. 365	*R.*	379, 421
Millie, The	[1940] P. 1	*Appr.*	339, 351, 352, 361, 367, 368
Ministry of Food *v.* Australian Wheat Board	[1952] 1 Lloyd's Rep. 297		157
Missouri Steamship Company, *In re*	42 Ch.D. 321, 336	*R.*	170, 171, 191
M'Naghten's Case	10 Cl. & F. 200	*R.*	120
Mooney *v.* Mooney	[1953] 1 Q.B. 38		18
Mordaunt *v.* Moncreiffe	L.R. 2 Sc. & D. 374	*R.*	257
Morris *v.* Davies	5 Cl. & Fin. 163	*R.*	311
Moss *v.* Moss	[1897] P. 263	*R.*	266
Mostyn, The	[1928] A.C. 57	*R.*	363
Mount Albert Borough Council *v.* Australasian Temperance and General Mutual Life Assurance Co.	[1938] A.C. 224	*Appl.*	151, 174
Musurus, In the Estate of	[1936] 2 All E.R. 1666	*Dist.*	224, 227–9, 231, 232, 242, 247, 250
Natborny *v.* Natborny	[1933] P. 1	*R.*	478
Njegos, The	[1936] P. 90	*R.*	193
Norton *v.* Norton	[1945] P. 56		440
O'Hara, *In re*	[1900] 2 I.R. 232		17
Oldroyd *v.* Oldroyd	[1896] P. 175	*C.*	199, 206
Packer *v.* Packer	[1954] P. 15	*Appr.*	312, 319, 320, 329, 333–5, 338
Paolantonio *v.* Paolantonio	66 T.L.R. (Pt. 2) 235; [1950] W.N. 355	*Dist.*	141, 148
Park, In the Estate of, Park *v.* Park	[1954] P. 89	*Aff.*	112
Park *v.* Park	1914 S.L.T. (O.H.) 88		116
Paul *v.* Paul and Farquhar	L.R. 2 P. & M. 93		216

Peek *v.* Peek	64 T.L.R. 429; [1948] P. 46; 66 T.L.R. (Pt. 2) 503	*R.*	459, 464, 467
Peninsular and Oriental Steam Navigation Co. *v.* Shand	3 Moo.P.C.N.S. 272	*R.*	164, 165, 190, 191
Petty *v.* Petty	[1943] P. 101	*R.*	466
Pickett *v.* Pickett	[1951] P. 267	*R.*	442
Pickles *v.* Foulsham	[1923] 2 K.B. 413	*R.*	435
Pike *v.* Pike	[1954] P. 81n.	*R.*	463
Pike *v.* Pike	[1954] P. 81; [1953] 1 All E.R. 232	*Dist.*	67, 75, 79
Pike *v.* Pike	[1954] P. 81n.	*Appl.* *C.*	271, 280, 281, 285, 286 292, 297–9
Pike *v.* Pike	[1954] P. 81n.		203
Portsmouth (Countess) *v.* Portsmouth (Earl)	1 Hagg.Ecc. 355	*R.*	97
Pratt *v.* Pratt	[1939] P. 117; [1939] A.C. 417		203
Pratt *v.* Pratt	[1939] A.C. 417	*Appl.*	486, 503, 516
Preston-Jones *v.* Preston-Jones	[1951] A.C. 391	*C.*	252, 257
Price *v.* Price	[1951] P. 13	*Appl.*	199, 207
Price *v.* Price	[1951] P. 413		490
Prince *v.* Prince	[1951] P. 71	*Appl.*	458, 461, 464–7
Queen, The *v.* The Inhabitants of Totley	7 Q.B. 596	*R.*	317
Ramsdale *v.* Ramsdale	173 L.T. 393	*Appl.*	473, 479, 480
Read *v.* Bishop of Lincoln	[1892] A.C. 644		374
Read *v.* Read	[1942] P. 87	*C.*	141, 145, 147, 149
Reg. *v.* Miskin Lower, Glamorganshire Justices, *Ex p.* Young	[1953] 1 Q.B. 533	*Appl.*	449, 452, 455, 456
Reg. *v.* Totley (Inhabitants)	7 Q.B. 596		19
Rex *v.* Hodnett (Inhabitants)	1 T.R. 96		18
Rex *v.* International Trustee for Protection of Bondholders A.G.	[1937] A.C. 500	*Appl.*	151, 175, 183, 188
Rex *v.* Tate	[1908] 2 K.B. 680	*R.*	255
Rex *v.* Tristram	[1902] 1 K.B. 816	*R.*	421
Richardson *v.* Richardson	[1950] P. 16		407
Ridsdale *v.* Clifton	2 P.D. 276		374
Roffe-Silvester *v.* King	[1939] P. 64	*R.*	376–8, 380
Roffe-Silvester *v.* King	[1939] P. 64	*C.*	417, 422, 424
Ronald West, The	[1937] P. 212		345
Rusby *v.* Rusby	[1950] W.N. 349	*R.*	59
Russell *v.* Niemann	17 C.B.N.S. 163	*R.*	173
Russell *v.* Russell	[1895] P. 315; [1897] A.C. 395	*C.*	199, 206
Russell *v.* Russell	[1895] P. 315; [1897] A.C. 395		407, 442
Russell *v.* Russell	[1897] A.C. 395	*R.*	75, 79, 87, 88, 281, 299
Russell *v.* Russell	[1924] A.C. 687	*R.*	38
Russell *v.* Russell	[1924] A.C. 687		306
Rutherford *v.* Richardson	[1923] A.C. 1	*Appl.*	395, 399
Safford *v.* Safford	[1944] P. 61		30
St. George's, Southall, *In re*	[1952] 1 All E.R. 323	*R.*	379
St. John the Evangelist, Clevedon *v.* All Having Interest	[1909] P. 6	*R.*	379
St. Luke's, Southport	(Unreported, 1926)	*R.*	423
St. Margaret's, Toxteth Park	40 T.L.R. 687	*F.*	370, 381
St. Mark's, Marylebone Road, *In re*	[1898] P. 114		374
St. Mark's, Wimbledon, *In re*	[1908] P. 167	*R.*	383
St. Mary the Virgin, Swanley	(1946, unreported)	*F.*	369, 375, 377
St. Mary the Virgin, Swanley	(Unreported, 1946)	*R.*	423, 425, 427
St. Michael, Bromley, *In re*	25 T.L.R. 95	*R.*	381

St. Peter, St. Helier, Morden, *In re*, and St. Olave, Mitcham, *In re*	[1951] P. 303	*F.*	370, 381
St. Saviour's, Hampstead, *In re*	[1932] P. 134		374
St. Saviour's, Walthamstow, *In re*	[1951] P. 147	*Appl.*	369
Savary *v.* Savary	79 L.T. 607	*R.*	214
Scott (falsely called Seabright) *v.* Seabright	12 P.D. 21	*R.*	266
Sheppard *v.* Bennett	L.R. 4 P.C. 350, 371	*R.*	421
Sheppard *v.* Bennett (Second Appeal)	L.R. 4 P.C. 371	*R.*	374
Shipman *v.* Shipman	[1924] 2 Ch. 140		492
Shorthouse *v.* Shorthouse	78 L.T. 687; 79 L.T. 366		217
Simpson *v.* Simpson	[1951] P. 320	*Dist.*	403, 412
Sopwith *v.* Sopwith	2 Sw. & Tr. 160		276
Sotherden *v.* Sotherden	[1940] P. 73		491
Spier, In the Estate of	[1947] W.N. 46	*R.*	99
Spring *v.* Spring and Jiggins	[1947] 1 All E.R. 886	*R.*	255, 256
Squire *v.* Squire	[1949] P. 51		414
Stanga *v.* Stanga	[1954] P. 10	*R.*	6, 10
Statham *v.* Statham	[1929] P. 131	*R.*	255, 256
Stevenson *v.* Stevenson	[1911] P. 191	*R.*	508, 510, 516
Stonedale No. 1, The	[1953] 1 W.L.R. 1241	*Aff.*	339
Stringer *v.* Stringer	[1952] P. 171		42
Style *v.* Style and Keiller	[1953] 3 W.L.R. 613	*Varied*	209
Tallack *v.* Tallack and Broekema	[1927] P. 211		216
Thomas *v.* Thomas	[1924] P. 194		203
Thomas *v.* Thomas	[1924] P. 194	*R.*	504, 516
Thomasset *v.* Thomasset	[1894] P. 295	*R.*	337
Thompson *v.* Thompson	[1938] P. 162; [1939] P. 1	*Appl.*	395, 400, 402
Timmins *v.* Timmins	[1919] P. 75	*R.*	72, 88
Timmins *v.* Timmins	[1953] 1 W.L.R. 757	*Appl.*	271, 281, 286
Timmins *v.* Timmins	[1953] 1 W.L.R. 757	*C.*	292, 297–300, 407, 439, 443
Timmins *v.* Timmins	[1953] 1 W.L.R. 757		475
Turner's case	2 H.L.C. 48, 61		262
Turner *v.* Meyers	1 Hagg.Con. 414	*R.*	96, 132
Underwood *v.* Underwood	[1946] P. 84		475
United States *v.* Rubenstein	151 Fed.Rep. (2nd ser.) 915	*C.*	259, 268, 269
Urka, The	[1953] 1 Lloyd's Rep. 478		342
Usmar *v.* Usmar	[1949] P. 1	*R.*	414
Vincent *v.* St. Magnus the Martyr	[1925] P. 1		374
W. *v.* W. (No. 1)	[1952] P. 152	*R.*	493, 495
Wakeman, *In re*	[1947] Ch. 607		475
Warrender *v.* Warrender	2 Cl. & Fin. 488		264
Watson *v.* Watson	[1954] P. 48	*R.*	309
Watt (or Thomas) *v.* Thomas	[1947] A.C. 484	*R.*	73
Way *v.* Way	[1950] P. 71		262
Webb *v.* Webb	[1952] 1 T.L.R. 453		315, 329
Weighman *v.* Weighman	[1947] W.N. 307; 64 T.L.R. 40	*Dist.*	141, 146, 148
Welton *v.* Welton	[1927] P. 162	*C.*	194, 196–8
Werber *v.* Werber	(Unreported, April 2, 1954)	*R.*	443
West Ilsley Case	(Unreported, 1952)	*R.*	418, 423, 425
West Ilsley, *In re* the Parish Church of	(1952, unreported)	*F.*	369, 378
Westall *v.* Westall	65 T.L.R. 337	*R.*	413

Westerton *v.* Liddell	Moore's Special Report, 159	*R.*	426
Wicks' Marriage Settlement, *In re*	[1940] Ch. 475		315
Wilhelm Schmidt, The	25 L.T. 34		154
Wilkins *v.* Wilkins	[1896] P. 108		276
Williams *v.* Williams	[1939] P. 365		492
Wilson *v.* Carnley	[1908] 1 K.B. 729		490
Winans *v.* Attorney-General	[1904] A.C. 287	*R.*	434
Winnan *v.* Winnan	[1949] P. 174	*R.*	284
Winter *v.* Winter	[1942] P. 151	*Dist.*	270, 283
Winter *v.* Winter	[1942] P. 151	*R.*	465
Wood *v.* Wood	[1947] P. 103	*R.*	39, 447
Woodland *v.* Woodland	[1928] P. 169	*R.*	92
Woodward *v.* Woodward	[1952] P. 299	*Appr.*	56, 59, 60, 65
Woolwich Union *v.* Fulham Union	[1906] 2 K.B. 240	*R.*	24
Woolwich Union *v.* Fulham Union	[1906] 2 K.B. 240	*R.*	317, 330, 331, 338
Workington Harbour and Dock Board *v.* The Towerfield (Owners)	[1951] A.C. 112	*Appl.*	339, 351, 363
Yeatman *v.* Yeatman	L.R. 1 P. & M. 489	*R.*	281, 299

STATUTES JUDICIALLY CONSIDERED

1847

Harbours, Docks and Piers Clauses Act, 1847 (10 *&* 11 *Vict. c.* 27), *ss.* 56, 74. **C.A. 338**

1894

Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503 - - - **C.A. 338**

1895

Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7. **Divl.Ct. 472**

Married Women (Separation and Maintenance) Acts, 1895–1949 - - **Divl.Ct. 41**

1897

Manchester Ship Canal Act, 1897 (60 *&* 61 *Vict. c. cviii*), *s.* 9 - - **C.A. 338**

1900

Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 *&* 64 *Vict. c.* 32), *ss.* 1, 3 - - - **C.A. 338**

1925

Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 32 - - - - - **C.A. 438**

1930

Mental Treatment Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 23), *s.* 5 (14) - **Karminski J. 26**

1936

Manchester Ship Canal Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c. cxxiv*), *s.* 32 (1) (2). **C.A. 338**

1949

Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 6 (4), *Sch. III.* **Sachs J. 480**

—— ——, *Sch. III* - - - **Sachs J. 468**

1950

Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*b*) - - **C.A. 486**

—— —— *ss.* 1 (1) (*d*), 2 (*a*) (*d*). **Karminski J. 26**

—— —— *s.* 4 - - - - - **C.A. 252**

—— —— *s.* 6 - - - - - **C.A. 438**

—— ——, *s.* 18 (1) (*b*) - **Karminski J. 428**

—— —— *ss.* 19 (1), 20 (1), 22 (1), 23. **Collingwood J. 194**

—— —— *s.* 23 - - - - **C.A. 55**

—— —— *s.* 23 - - **Karminski J. 138**

—— ——, *s.* 23 (1) - - - - **C.A. 444**

—— —— *s.* 24 (1) - - **Barnard J. 209**

—— ——, *s.* 25 - - - **Davies J. 384**

—— —— *s.* 26 (1) - - - - **C.A. 15**

—— —— *s.* 26 (1) - - - **C.A. 312**

—— —— *s.* 32 (1) - - - **C.A. 305**

1952

Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 64, 74, 75, 76 - - - - **Divl.Ct. 449**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Legal Aid (General) Regulations, 1950 (*S.I.* 1950, *No.* 1359), *reg.* 14 (6A). **Sachs J. 468**

Legal Aid (General) (Amendment No. 1) Regulations, 1954 (*S.I.* 1954, *No.* 166), *para.* 23 - - **Sachs J. 468**

Legal Aid Scheme, 1950, *para.* 33. **Sachs J. 468**

Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940), *r.* 9 (5) **Willmer J. 141**

—— —— *r.* 36 (1) - - - **Divl.Ct. 458**

—— —— *r.* 56 - - **Collingwood J. 194**

—— —— *r.* 56 (10) - **Karminski J. 138**

—— —— *r.* 64 (3), (9) - - **Divl.Ct. 10**

—— —— *r.* 64 (5), (9) - - **Divl.Ct. 1**

—— —— *r.* 71 (3) - - **Divl.Ct. 302**

—— —— *r.* 80 - - - **Barnard J. 209**

Mental Treatment Rules, 1930 (*S.R. & O.* 1930, *No.* 1083), *rr.* 5, 39. **Karminski J. 26**

R.S.C., Ord. 51, *r.* 7 - - **Barnard J. 209**

CASES

DETERMINED BY THE

PROBATE DIVORCE & ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

GORE-BOOTH *v.* GORE-BOOTH.

1953
June 22.

Lord Merriman P. and Pearce J.

Husband and Wife—Divorce—Procedure—Service of petition—Absence of appearance—Respondent of unsound mind—Mandatory nature of rules—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940/*L.* 27), *r.* 64 (5), (9).

The provisions of rule 64 (5) and (9) of the Matrimonial Causes Rules, 1950, are mandatory. It is important that the court should guard jealously the provisions of rule 64, which was framed for the express purpose of protecting infants and persons of unsound mind.

A husband who had been served personally with a petition for divorce, and who had failed to enter an appearance, was held to have been of unsound mind at the material times. No application had been made for the appointment of a guardian ad litem and the wife had been granted a decree nisi in the undefended list. Application was made to the Divisional Court for a rehearing:—

Held, that in view of a failure to comply with the provisions of the rule, the decree must be set aside.

Per Pearce J.: It may be necessary in some future borderline cases to investigate with more particularity the precise area covered by the words "of unsound mind" in rule 64.

1953

GORE-BOOTH
v.
GORE-BOOTH.

MOTION for a rehearing of an undefended petition for divorce.

The parties were married in 1948. On October 5, 1951, the husband became a temporary patient under the (Irish) Mental Treatment Act, 1945,[1] at St. Patrick's Hospital, Dublin, and on March 20, 1952, he went to St. Edmondsbury Hospital, Lucan, Dublin, a convalescent part of Saint Patrick's, where he remained until June 21, 1952.

In April, 1952, the wife presented a petition for divorce on the ground of cruelty, relying in respect of jurisdiction upon section 18 (1) (*b*) of the Matrimonial Causes Act, 1950. The petition was served on the husband personally on April 16, 1952, at the convalescent home, and a notice which by an oversight had not been served on the 16th was served personally on April 22. The husband refused to sign the acknowledgment of service.

On May 6, 1952, the wife's solicitors wrote to Dr. J. N. P. Moore, the medical superintendent of St. Patrick's Hospital: "You will appreciate that it was necessary for us to arrange for "Mr. Gore-Booth to be served with a copy of the petition and "other papers connected with the divorce, and with this object "in view we instructed agents in Dublin. We advised our agents "that Mr. Gore-Booth was a patient at your hospital, and had "assumed that they would get in touch with you for guidance "as to when service could be effected. We have now ascertained, "however, that our agent interviewed Mr. Gore-Booth at St. "Edmondsbury, Lucan, Dublin, on both April 16 and 22, when, "on the latter occasion, service of the documents was duly "completed. Mr. Gore-Booth refused to sign the acknowledgment of service form which was handed to him by our agent, "and has not caused an appearance to the action to be entered "on his behalf. We are very loth to take steps for the action "to be set down for trial in the undefended list until we have "satisfied ourselves that Mr. Gore-Booth understands that his "wife has taken proceedings for divorce, and that unless he "forthwith takes some action in the matter the case will be "heard by the court in his absence. Might we trouble you to "let us know whether, bearing in mind his recent mental illness, "you have any reason to suppose that he has not understood the "nature and purport of the documents that were recently served "on him. We look forward to hearing from you in this matter

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[1] A summary of the relevant sections is given in the judgment of Lord Merriman P.

"at your earliest convenience." Dr. Moore, after making it clear that he had got in touch with the family before answering, said in his reply of May 17, 1952: "He [the husband] has had "a serious illness and has recently completed a prolonged course "of treatment and is now convalescing at our branch hospital in "Lucan. I am glad to say that he has made excellent progress "with treatment and I hope before long he will be able to leave "hospital. I think it is most unfortunate that at this stage he "should have the stress and strain of dealing with a legal matter "such as you mention in your letter. In the interests of his "health and complete recovery I should be most grateful if you "could postpone taking any action in the matter for, say, six "months, when I hope that Mr. Gore-Booth will be able to deal "with the matter himself. Certainly as long as he is in hospital "I think it would be inadvisable for him to deal with the matter, "and I am sure you too would feel it more satisfactory that he "should be out of hospital before proceeding with the action."

The husband left the convalescent hospital on June 21, 1952. The circumstances of his discharge are given in the communication of May 7, 1953, from Dr. Moore, referred to below. No appearance was entered by the husband, and on July 31, 1952, the wife was granted a decree nisi of divorce in the undefended list. On August 17, 1952, the husband filed in person a notice of motion for a rehearing, putting forward as the grounds of the appeal: "(1) That of illness when the petition was sup-"posed to be served and therefore inability to file a defence; "(2) that the petition was not supposedly properly served; "(3) that the matter be reheard, application being made for "restoration (sic) of conjugal rights." The motion came before the Divisional Court (Lord Merriman P. and Davies J.) on November 3, 1952; but the husband did not appear although certain letters from him to the Clerk of the Rules were before the court. It appeared at that time that he had been in Iceland after his discharge and wished the proceedings to be transferred to Paris, where he considered that they might be more conveniently dealt with. The court came to the conclusion that the motion should not be disposed of in those circumstances and the matter was adjourned for the appointment of a guardian ad litem. The Official Solicitor was appointed, and he addressed a series of questions to Dr. Moore. The following summary of those questions, and of the superintendent's replies (which he later confirmed in an affidavit), are taken from the judgment of Lord Merriman P.

1953

GORE-BOOTH
v.
GORE-BOOTH.

The first question by the Official Solicitor elicited the date on which the husband entered St. Patrick's Hospital (October 5, 1951). The second question elicited that the nature of his illness which necessitated treatment there was the mental illness known as schizophrenia, and the third that he was a temporary patient under the Mental Treatment Act (Eire), 1945. The doctor was then asked when the husband left St. Patrick's Hospital and under what circumstances—that is to say, was he then fully recovered or was he still suffering from some form of mental illness? The answer was that he left St. Edmondsbury, Lucan, on June 21, 1952, and by the answer to the next question, that St. Edmondsbury, Lucan, was a convalescent part of St. Patrick's Hospital. The medical superintendent continued: "I had arranged his "discharge care of his relatives. Actually, he left before his "relatives called for him, and went away without leaving an "address. He was not fully recovered at this time, though in "my opinion well enough to be discharged from hospital."

Finally, the medical superintendent was asked the following group of questions: "During the period April 16–22, 1952" (dates which were intended to cover the two attempts at the service of the documents) "do you consider that Mr. Gore-"Booth was a person of unsound mind in the sense that he was "or was not capable of (*a*) making up his mind rationally whether "or not he wished his marriage dissolved and (*b*) of conducting "his defence to his wife's petition unaided or properly instructing "solicitors so to do?" To that the answer was: "During the "period April 16–22, 1952, I consider that Mr. Gore-Booth was "a person of unsound mind in the sense that he was not capable "of (*a*) making up his mind rationally whether or not he wished "his marriage dissolved and (*b*) of conducting his defence to his "wife's petition unaided or properly instructing solicitors so to "do."

There had been no service in accordance with the provisions of rule 64 (5) of the Matrimonial Causes Rules, 1950,[2] and

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[2] Matrimonial Causes Rules, 1950, r. 64 (5): "Where in any such cause "any document is required to be "served and the person on whom "service is to be effected is of unsound mind, then, unless otherwise "directed, that document shall, if "the Official Solicitor has consented "to act as guardian ad litem, be "served on him and shall, in any "other case, be served upon the "person with whom the person of "unsound mind resides or under "whose care he is, and service so "effected shall be deemed good "service upon the person of unsound "mind."

R. 64 (9): "Where a petition or "answer has been served on a person "who is an infant or a person of "unsound mind and no appearance "has been entered in the cause by although no appearance had been entered, no step had been taken under rule 64 (9).

James Comyn for the Official Solicitor as guardian ad litem to the husband. Upon the evidence before the court the husband was shown to have been of sufficient unsoundness of mind to bring the case within rule 64 of the Matrimonial Causes Rules, 1950, whether or no an extension order under the (Irish) Mental Treatment Act, 1945, had in fact been in force at the relevant time. It was made clear in *Stanga* v. *Stanga*[3] that the provisions of rule 64 were mandatory; and since there has been a failure to comply with the relevant sub-rules, the decree should be set aside and a rehearing ordered.

Melford Stevenson Q.C. and *Victor Williams* for the wife. While the mandatory nature of the rule is not disputed, it is submitted that the husband, who had left hospital and found temporary employment at the date of the hearing, was shown upon the evidence to have been of sufficient soundness of mind at the relevant time. Unsoundness of mind has not been precisely defined; but mere residence in a mental hospital does not necessarily mean that a patient is of unsound mind.

James Comyn, in reply, referred to *Smith* v. *Smith*.[4]

LORD MERRIMAN P. referred to the granting of the decree, to the motion for rehearing and to the appointment of the Official Solicitor, and said:—It is plain that the illness of which the husband speaks in the notice of motion was mental illness, and that when he speaks of the papers being "supposedly served" he is referring to the fact, which is now clearly established, that personal service was effected upon him when he was in a branch of a mental hospital in Ireland; and that the phrase "not supposedly properly served" refers to that fact. It is that which he says constituted his inability to file a defence, and, in any case, he has applied to be able to file an answer or cross-petition for restitution of conjugal rights. That is the substance of the matter, that he has not had an opportunity, in accordance with

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"or on behalf of the infant or person "of unsound mind, or where an "originating summons has been "served on an infant or person of "unsound mind, the party at whose "instance the petition, answer or "originating summons was served "shall, before proceeding further with "the cause, apply for an order that "some proper person be assigned "guardian of the infant or person of "unsound mind by whom he may "appear and defend or intervene in "the proceedings."

[3] Post, 10.

[4] [1940] P. 179, 181–2.

the proper procedure of this Division, to put his case before the court.

The rule governing procedure in these matters is rule 64 of the Matrimonial Causes Rules, 1950, which is headed "Infants "and Persons of Unsound Mind." [His Lordship read sub-rules (5) and (9) and continued:] The cardinal issue is whether the husband at the material time was a person of unsound mind within the meaning of this rule. If so, there is no dispute that the service effected was an improper and unauthorized service. It is quite evident that the solicitors for the wife wished and intended the service to be effected in some way through the authorities of the place at which the husband was, but that for some reason, which has not been made apparent, their instructions to the agent who was to effect service were not carried out.

The agent served the husband personally, and on a later occasion tried to get him to sign an acknowledgment of service, which the husband refused to do, so that the matter was not done through the authorities of the institution. It is not necessary, in my opinion, for us to consider whether, in the circumstances which afterwards happened, that fact by itself would be fatal to the service. Suffice it to say that it was admitted that it was a bad service if the husband can be properly described within the rule as a person of unsound mind. The second step is, if anything, more important, because whether he was or was not served in the technical sense of the word, it is clear that at no material time has he entered an appearance. If, therefore, he was a person of unsound mind it was the duty of those representing the wife to apply for the appointment of a guardian ad litem if the Official Solicitor or some other guardian had not been already appointed, and to apply for a guardian for the express purpose of enabling him to appear and defend in the proceedings. I say no more than this, that it has been held in this court, in *Stanga* v. *Stanga*,[1] in the corresponding case of an infant, that the sub-rule is mandatory, and that non-compliance with it vitiates the whole proceedings. In my judgment in that case I gave the history of the way in which this rule came into being. Suffice it to say that it was drawn for the Rules Committee by Lord Greene and Lord Clauson as being an exposition of the recognized Chancery practice in connexion with persons under disability.

The petition in the present case was brought in this jurisdiction under the authority of section 18 (1) (*b*) of the Matrimonial

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[1] Post, 10.

Causes Act, 1950, by a wife who was resident in England, and had been ordinarily resident in England for a period of three years immediately preceding the commencement of the proceedings, against a husband who was not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man. It is said, though not absolutely established, that he was domiciled in Eire; and manifestly the fact that the proceedings are thus complicated demands more than ordinary care to ensure that the rules concerning service, and the appointment of a guardian, if the husband is under a disability, should be strictly observed.

It is clear that on October 5, 1951, the husband became a temporary patient under the Mental Treatment Act, 1945, which is the Act governing mental ill-health and treatment in Eire. Even now we have not seen any official document concerning this particular patient, but we have the evidence of the superintendent of St. Patrick's Hospital, Dublin, which I understand is the principal hospital in Southern Ireland for mental treatment.

We have not been taken exhaustively through the Mental Treatment Act, but it is sufficient to refer to one or two sections to make plain what the position was, first of all, in October, 1951. Dr. Moore has told us that the husband was received as a temporary patient. "Temporary patient" means a patient who is suffering from mental illness and is believed to require for his recovery not more than six months' suitable treatment, and is unfit, on account of his mental state, for treatment as a voluntary patient. There is a second branch which refers to patients who are addicts, defined by the same section as being people who are suffering from the effects of drink or drugs. In the husband's case he was a temporary patient because he was suffering from mental illness and was unfit, because of his mental state, for treatment as a voluntary patient. I am not attempting to be exhaustive about the possible reasons for unfitness for treatment as a voluntary patient, but it is quite clear from a later section that one, at least, of these reasons may be because he was mentally incapable of expressing himself as willing or not willing to remain in the institution to be treated as a voluntary patient. There is a later section, 195, which provides what is to happen if a person who is a voluntary patient becomes mentally incapable of expressing such opinions. There is no dispute that whether the temporary patient is to be received as a private patient or as a patient chargeable to public funds, the procedure is to make the appropriate order for his detention. Sections 184 and 185 deal with the chargeable patient and the private patient respectively, and make it clear who may make the application and that the application has to be supported by establishing the three propositions which I have already read out, which are repeated as conditions precedent to the making of an order for detention. Equally, it is clear from section 189 that the order does not necessarily come to an end at the end of six months, because the Minister, if he thinks fit, may by order extend the period by a further period not exceeding six months, or may by a series of orders extend it by further periods, none of which shall exceed six months, and the aggregate of which shall not exceed 18 months. Not only have we not seen the original order, but we do not know one way or the other whether an extension order was made by the Minister.

[His Lordship then referred to the dates of the husband's reception into St. Patrick's Hospital, and of service, saying that the six-month period would expire in April, 1952, and that the transfer to St. Edmondsbury must be assumed to have been during the currency of the original order of October 5, 1951. His Lordship then summarized the correspondence between the Official Solicitor and Dr. Moore, referred to above, and continued:] It is not known whether at that time when the husband left St. Edmondsbury (June 21, 1952) there was an effective extension of the original order in being or not, and, therefore, it would not be right to lay too much stress upon the use of the word "discharge" in Dr. Moore's answer. Suffice it to say that it is consistent, but not exclusively consistent with the discharge from detention of a man who is detained under an effective order. It was made clear, however, that he had proceeded direct from the principal hospital to the St. Edmondsbury branch, and that when he went to St. Edmondsbury on March 20, 1952, he was still under the care of the hospital medical and nursing staff. The name of the resident doctor at St. Edmondsbury, who works under the supervision of the medical superintendent, was also given.

If Dr. Moore's answer holds good, it is, in my opinion, clear that although there is no definition for the purposes of rule 64, and, indeed, for many other purposes, of "unsound mind" or "being "a person of unsound mind," the husband at the time of the purported service was a person of unsound mind within the meaning of the rule. But it is said that this answer does not hold good, and that this court ought not to accept that answer because it is inconsistent with an earlier answer given by the medical superintendent to the wife's solicitors. [His Lordship then considered the letter written by the wife's solicitors on May 6, 1952, and Dr. Moore's reply of May 17, 1952, referred to above, and continued:] I say no more by way of analysis of Dr. Moore's reply than this, that it is implicit, if it is not actually expressed in it, that on May 17, 1952, a month after the purported service had been effected, the husband was still ill and unable to leave hospital (though it was hoped that complete recovery might occur), and, above all, that he was not at the date of writing capable of dealing with the matter. I have some difficulty in understanding how, with that expression of opinion, it was thought proper to proceed without complying with subrule (9) and obtaining the appointment of a guardian ad litem.

In my opinion there is no real inconsistency between what Dr. Moore said then and the considered and more detailed opinion that he later gave to the Official Solicitor. I think that the question posed in the letter of May 6, 1952 (which assumes that the husband's mental illness was "recent," whereas, in fact, it persisted at that date), namely, whether the medical superintendent had any reason to suppose that the patient had not understood the nature and purport of the documents that were recently served upon him, raises much too narrow an issue. That, in my opinion, is exactly why the medical superintendent, very properly, I think, declined to be pinned down to that aspect of the matter alone, and gave a much fuller and more comprehensive answer, which seems to me to have demanded much more serious consideration than it received. I think that there was sufficient information in the letter of May 17, 1952, from Dr. Moore to necessitate an application under rule 64 (9). In a word, I think the wife went on at her peril. In my opinion we have no option whatever but to set aside this decree.

PEARCE J. I agree with what my Lord has said. Here there has not been that compliance with the provisions of rule 64 which is required when a suit is brought against an infant or a person of unsound mind.

It may be necessary in some future borderline case to investigate with more particularity the precise area covered by the words "of unsound mind" in this rule, but here I see no such necessity. This is not a borderline case. The doctor's answers to the Official Solicitor's questionnaire are verified by affidavit. They satisfy me that for the purposes of rule 64 the husband was, in the doctor's opinion, of unsound mind at the material dates. There is no evidence to the contrary. The doctor's earlier letter gives me no reason to doubt the accuracy and honesty of that opinion, and in my view it is consistent with that. I accept the doctor's opinion as correct.

It is important that this court should guard jealously the provisions of rule 64, which were carefully framed, as my Lord has explained, in *Stanga* v. *Stanga*,[1] by two judges of great distinction, for the express purpose of protecting infants and those of unsound mind. Whatever the merits of a case this court ought always, in my view, to set a decree aside where the provisions of rule 64 (9) have not been carried out. I agree, therefore, that the decree must be set aside.

Decree set aside.

Solicitors: *Official Solicitor; Trower, Still & Keeling.*

J. B. G.

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[1] Infra.

STANGA *v.* STANGA.

1953
Feb. 18.

Lord Merriman P. and Davies J.

Husband and Wife—Divorce—Procedure—Service of petition—Absence of appearance—Respondent an infant—Mandatory nature of rules—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940/*L.* 27), *r.* 64 (3), (9).

The provisions of rule 64 (3), (9) of the Matrimonial Causes Rules, 1950, are mandatory.

Service of a petition for divorce was effected upon an infant—the wife—who failed to enter an appearance. No application was made for the appointment of a guardian, and a decree nisi of divorce was granted in the undefended list. The wife applied to the Divisional Court for a rehearing:—

Held, that in view of a failure to comply with the provisions of the rule, the decree must be set aside.

Giles v. *Giles* [1900] P. 17; *Burnett* v. *Burnett and Purdy* (1922) 39 T.L.R. 111; *Leaver* v. *Torres* (1899) 43 S.J. 778 applied.

MOTION to set aside a decree nisi of divorce pronounced on November 8, 1951, in an undefended suit.

The parties were married in England in 1947, and both parties were displaced persons, though they had acquired an English domicile. The wife was born in Latvia on April 23, 1931. On September 6, 1951, the husband presented a petition for divorce on the ground of desertion. The petition was served by registered post, and the wife (who was still under the age of 21) signed and returned the acknowledgment of service in the usual way. There was no service of the petition in accordance with the provisions of rule 64 (3) of the Matrimonial Causes Rules, 1950,[1] although it was said that the wife was living at the father's house, and, although no appearance was entered, no application was made in accordance with rule 64 (9) for the appointment of a guardian. A decree nisi was pronounced on November 8, 1951, at Leicester. The suit was undefended.

When steps were being taken to make the decree nisi absolute, it was discovered that at the material time the wife was an infant, and the husband's solicitor brought the matter to the attention of the Leicester district registrar. The registrar advised that even at that stage the Official Solicitor ought to be made a guardian ad litem, so that such steps as might be appropriate could be taken, and he was appointed guardian on April 16, 1952.

In October, 1952, having completed his investigations, the Official Solicitor appeared before Lord Merriman P. in chambers ex parte; and although the wife had by then attained her majority, he was encouraged to bring the matter to the attention of the court.

Leave was given to extend the time to enable the present motion to be brought; there was no opposition to the application for such leave. The wife indicated that she now wished to defend the proceedings.

Stuart Horner for the Official Solicitor as guardian ad litem to the wife.

Guy Dixon for the husband.

LORD MERRIMAN P., stating the facts, said that it was reasonably clear that the service had not been effected as it

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[1] Matrimonial Causes Rules, 1950, r. 64 (3): "Where in any cause to "which these rules apply any document is required to be served and "the person on whom service is to be "effected is an infant, the document "shall, unless otherwise directed, be "served on the father or guardian "of the infant or, if he has no father "or guardian, upon the person with "whom he resides or under whose "care he is, and service so effected "shall be deemed good service on the "infant, so however that a registrar "may order that service effected or to "be effected on the infant shall be "deemed good service."

1953

Stanga
v.
Stanga.

Lord Merriman P.

should have been under the provisions of rule 64 (3), whereby, in the case of an infant, unless a direction to some other effect had been obtained, the document should be served on the father or guardian of the infant, or, if there were no father, upon the person with whom the infant resided or under whose care he was; and that that was deemed to be a good service. There was therefore the initial objection that there had been no proper service, in spite of the acknowledgment of service, which appeared on the face of it to be regular.

His Lordship said that he would like to take the opportunity of saying at once that there was not the slightest suggestion that those conducting the case on behalf of the husband had been guilty of any impropriety or concealment in the matter. On the contrary, everything that was now known about the difficulties which arose was known because of a disclosure by the husband's solicitors to the district registrar at Leicester, after the decree nisi had been pronounced, and when steps were being taken to make the decree absolute, of the discovery by them that at the material time the wife was an infant, whereupon the district registrar had very properly advised that even at that late stage the Official Solicitor ought to be made a guardian ad litem to see what steps, if any, could be taken to put the matter right. His Lordship said that he had been assured by both counsel that they were in no wise embarrassed by the fact that he had been connected with the case on the ex parte application at an earlier stage, and continued:

Leaving aside for the moment the fact that there clearly was no proper service, the part of rule 64 which is relied on is sub-rule (9),[1] for which purpose it is assumed that a petition has been served on a person who is an infant. Inasmuch as I doubt whether the petition has been served within the meaning of rule 64 (3), it may be said that this condition precedent to the application of sub-rule (9) does not apply; but a form of service was effected, and the wife did in fact receive the petition. No appearance was entered by her or on her behalf, and in those circumstances it is laid down that "the party at "whose instance the petition . . . was served shall, before "proceeding further with the cause, apply for an order that some "proper person be assigned guardian of the infant . . . by "whom he may appear and defend or intervene in the proceed- "ings." It is beyond doubt that no such application was made until at the instance of the registrar at Leicester after the decree nisi had been pronounced.

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[1] See note 2, p. 4, ante.

The next question is whether the terms of the rule are such that the non-compliance with the directions about service, or the failure to appoint a guardian—non-compliance, whichever way one looks at it, with directions which are stated to be mandatory—is such that this vitiates the whole proceedings. I do not think that it is necessary to go into elaborate detail about the history of the rules, but there was a rule passed in 1875, rule 196,[2] which dealt with persons of unsound mind. I need not read the rule, because it has no direct application to the present case. I think that I am right in saying that the set of Rules of 1924 [3] is the last complete code of rules governing divorce proceedings in this Division which was issued simply on the fiat of the President of the day without his being obliged to submit it, as is now the case, to the Supreme Court Rules Committee. In so far as that code was applicable in the case of infants, so far as I understand it, the only specific provisions related to infants under the age of seven years, which, one might suppose, has somewhat remote connexion with divorce proceedings. Still, there it is. The provisions are contained in rule 74, of which (*b*) deals with the appointment of a guardian for an infant under the age of seven, and (*a*), on the other hand, says that a minor who has attained the age of seven may elect his own guardian. Paragraph (*c*) lays down that " the election, the " consent of the guardian to act, and an affidavit showing fitness " and no contrary interest must be filed in the registry before " the elected guardian can be permitted to file a petition or " enter an appearance on behalf of the minor "; and there, so far as I can see, the matter ends, for the next rule reproduces the substance, though not exactly the form, of the old rule 196 in connexion with persons of unsound mind.

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[2] Rule 196, dated July 14, 1875 ([1875] W.N. (Pt. 2) 296): " A committee duly appointed of a person " found by inquisition to be of unsound mind may take out a citation " and prosecute a suit on behalf of " such person as a petitioner, or enter " an appearance, intervene, or proceed with the defence on behalf of " such person as a respondent; but " if no committee should have been " appointed, application is to be made " to one of the registrars, who will " assign a guardian to the person of " unsound mind, for the purpose of " prosecuting, intervening in, or defending the suit on his or her behalf; " provided that if the opposite party " is already before the court when the " application for the assignment of a " guardian is made he or she shall be " served with notice by summons of " such application."

[3] S.R. & O. 1924, No. 126/L. 2, dated February 14, 1924.

The next complete set of Rules was that prepared in connexion with the coming into force of the Matrimonial Causes Act, 1937,[4] which was drafted by a committee on which I think I may say all interests were represented, including, I think for the first time, the managing clerks of two firms who were very much versed in these matters; and we did our best to produce a set of Rules for submission to the Rules Committee. It was, however, pointed out that we had not dealt, or dealt sufficiently, with the cases of infants and persons of unsound mind. With regard to such persons, it is clear from *Giles* v. *Giles*,[5] and a case before Horridge J. in 1922, *Burnett* v. *Burnett and Purdy*,[6] that this Division had to rely on R.S.C., Ord. 13, r. 1, for power to appoint the Official Solicitor as guardian ad litem of a lunatic. Accordingly, the late Lord Greene M.R. and the late Lord Clauson undertook to draw what is now rule 64 of the Matrimonial Causes Rules, 1950, and from that day to this the rule has in substance remained unchanged.

I do not think that there can be any doubt, and, indeed, Mr. Dixon has made it clear that he is not prepared to argue that there is any doubt, that this rule is mandatory. R.S.C., Ord. 13, r. 1, has expressly been held, in the Queen's Bench Division, to be mandatory: *Leaver* v. *Torres*.[7] It was a decision of Darling J., and although the order was stayed pending an appeal, it appears from the textbooks that there never was an appeal. He held that the order was mandatory, and that non-compliance with the provisions made the whole proceedings nugatory and that the judgment obtained thereon must be set aside.

I would only add that Mr. Dixon has very rightly drawn our attention to a point which reinforces in this case the necessity for a strict compliance with the rules, for it appears that the husband's advisers have been made aware that in spite of the fact that as an infant the wife allowed these proceedings on this charge of desertion to go by default, she now wishes to contest the whole matter.

It is not necessary for us to say whether, apart from this rule, it is a case in which we should have felt obliged to set the decree aside notwithstanding that she had deliberately stood by (if that can be said of an infant), a proposition for which there

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[4] S.R. & O. 1937, No. 1113/L. 14, dated December 8, 1937.

[5] [1900] P. 17.

[6] (1922) 39 T.L.R. 111.

[7] (1899) 43 S.J. 778.

1953

STANGA
v.
STANGA.

is abundant authority. The ground of this application is that the rule was not complied with. That is not disputed, and it seems to me that it inevitably follows that it is our duty to set this decree aside, and to give such consequential directions as are appropriate.

DAVIES J. I agree, and have nothing to add.

Solicitors: *Sydney Bayne & Troath, Leicester; Official Solicitor.*

J. B. G.

PACKER *v.* PACKER.

C. A.

1953
May 11.

Denning and Morris L.JJ.

Husband and Wife — Divorce — Custody — Child born in adultery — Subsequent marriage and divorce of parents—Question of jurisdiction to order custody or maintenance—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).

On an application by a wife for orders for custody and maintenance of the child of herself and the respondent, born before the marriage and at a time when the husband was married to another woman, the special commissioner held, on the authority of *Harrison* v. *Harrison* [1951] P. 476, that the court had no jurisdiction to make orders concerning an illegitimate child. The wife appealed:—

Held, per Denning L.J. that, contrary to the view expressed in *Harrison* v. *Harrison*, supra, section 26 (1) of the Matrimonial Causes Act, 1950,[1] includes illegitimate as well as legitimate children, and that the test of the jurisdiction of the Divorce Court to make orders in respect of children on dissolution of marriage is, therefore, parenthood and not legitimacy. Such a construction is consistent with reason and good sense and with the express power given by the section to make provision for the illegitimate children of void marriages.

An order for custody is an order in personam as between the parties to the proceedings and not an order in rem affecting the status of the child.

[Reported by Miss ELAINE JONES, Barrister-at-Law.]

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[1] Matrimonial Causes Act, 1950, s. 26: "(1) In any proceedings for "divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just with "respect to the custody, maintenance "and education of the children the "marriage of whose parents is the "subject of the proceedings, or, if it "thinks fit, direct proper proceedings "to be taken for placing the children "under the protection of the court."

C. A.
1953

PACKER
v.
PACKER.

Held, per Morris L.J., that the word "children" in section 26 (1) does not include illegitimate children. The prima facie meaning of the word "child" or "children" in a statute is that of legitimate child or legitimate children unless a wider meaning is more consonant with the object of the statute. The use of the phrase "the children the marriage of whose parents is the subject "of the proceedings" in section 26 (1) is not intended to confer a wider meaning on the word "children" but refers only to the express power given to the court by the section in respect of the children of void marriages.

Harrison v. *Harrison*, supra, approved.

The Court of Appeal being equally divided in opinion, the appeal was dismissed.

APPEAL from orders of Judge Richardson sitting as a special commissioner at Newcastle-upon-Tyne dismissing the appellant's application for orders for custody and maintenance of the child of herself and the respondent.

On February 9, 1944, a child was born to the appellant wife as a result of an association with the respondent husband, who was then married to another woman. The parties married on July 30, 1945, shortly after the dissolution of his first marriage. Under section 1 (2) of the Legitimacy Act, 1926, the subsequent marriage did not legitimate the child. On January 9, 1952, the second marriage was dissolved on the ground of the husband's desertion. The wife applied, in her divorce proceedings, for an order for maintenance of the child. That application was adjourned by the registrar to the special commissioner, and came before him on December 12, 1952, together with an application for an order for custody. The special commissioner held, on the authority of *Harrison* v. *Harrison*,[1] that the court had no jurisdiction to entertain the proceedings.

The wife appealed.

William Latey Q.C. and *John B. Gardner* for the appellant. If the appellant is entitled to an order for custody she is also entitled to an order for maintenance. The substance of section 26 (1) of the Matrimonial Causes Act, 1950, was first enacted in section 35 of the Matrimonial Causes Act, 1857, as regards interim orders, and was extended in section 4 of the Act of 1859 to orders after decree, and re-enacted in section 193 of the Supreme Court of Judicature (Consolidation) Act, 1925. In each enactment the vital words "children the marriage of whose "parents is the subject of the proceedings" remained unchanged. In other sections of the Act of 1950 the words "children of the "marriage," clearly referring to legitimate children, are used: see sections 2 (2), 23 (1), 24 (1), (2), 25 and 30 (3). The inference is clear that the special wording of section 26 (1) was intended to take in illegitimate children.

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[1] [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346.

In the Chancery Division orders for the custody of illegitimate children can be made in exercise of the inherent jurisdiction of the Crown as parens patriae. The Guardianship of Infants Acts are based on that jurisdiction, and in those Acts the words "mother" and "father" are used throughout in order to avoid the exclusion of illegitimate children. In the same way, it is submitted, the word parents is used in the section under consideration. The rules of equity have been extended to the other Divisions of the High Court and thus bind the Divorce Division in its jurisdiction over children. *In re O'Hara*,[2] *In re Gavagan*[3] and *In re Carroll (No. 2)*[4] all affirm this proposition.

There is little authority precisely on the point in issue. In *Harrison* v. *Harrison*[5] the case of *Langworthy* v. *Langworthy*,[6] a nullity suit in which the marriage was annulled for informality, was distinguished on the ground that the section gives express power to grant custody in nullity proceedings. There is no clear indication in the latter case that the court regarded the express power given by the statute as the sole basis for its decision. *Bednall* v. *Bednall*,[7] *Green* v. *Green*,[8] *Jones* v. *Jones*,[9] *M.* v. *M.*[10] and *Colquitt* v. *Colquitt*[11] were all cases in which the issue was as to the power of the court to grant custody of children who had been legitimated. In the first three of those cases the court held that a child born illegitimate was without the cognizance of the court even though subsequently legitimated. *M.* v. *M.*[12] disagreed with those decisions, and expressed the view, which was, however, obiter dictum, that the test of jurisdiction under section 26 (1) was parenthood and not legitimacy. That decision was

[2] [1900] 2 I.R. 232.

[3] [1922] I.R. 148.

[4] [1931] 1 K.B. 317; 47 T.L.R. 125.

[5] [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346.

[6] (1886) 11 P.D. 85; 2 T.L.R. 373.

[7] [1927] P. 225; 43 T.L.R. 599.

[8] [1929] P. 101; 45 T.L.R. 7.

[9] (1929) 45 T.L.R. 292.

[10] [1946] P. 31; 62 T.L.R. 16; [1945] 2 All E.R. 525.

[11] [1948] P. 19; 63 T.L.R. 358; [1947] 2 All E.R. 50.

[12] [1946] P. 31; 62 T.L.R. 16; [1945] 2 All E.R. 525.

approved in *Colquitt* v. *Colquitt*,[13] but it was suggested there that the test put forward in *M.* v. *M.*[14] was too wide.

Apart from *Harrison* v. *Harrison*,[15] which it is now sought to overrule, the authority on the matter under consideration consists of two conflicting obiter dicta. In *Langworthy* v. *Langworthy*[16] Cotton L.J. used some very significant words on this point. He said: "The section refers to the children not 'of the marriage,' "but 'the marriage of whose parents is the subject of such suit "'or proceedings.' The section includes sentences of nullity of "marriage, and must, therefore, in my judgment, be considered "as enacting that in cases where there is no valid marriage the "children of the union may be provided for." This observation must apply equally whether a child is illegitimate by reason of the initial invalidity of the marriage or the fact that the child was born to the parties before the marriage, and the terms of the section take in not only nullity but also suits for divorce and judicial separation.

It is submitted that the law was correctly laid down in *M.* v. *M.*[17] and that the expression filius nullius est on which the court relied in *Green* v. *Green*,[18] and which also influenced the decisions in the other cases to which reference has been made, is not properly applied to an illegitimate child except where questions of inheritance or succession are in issue: *Rex* v. *Hodnett (Inhabitants)*.[19]

If this appeal is not allowed, a mother in the position of this appellant will suffer grave injustice. She will be unable to obtain custody and maintenance under section 26 (1) because the child is illegitimate, while she may be unable to obtain an affiliation order against the father because he is her husband: *Mooney* v. *Mooney*.[20]

N. R. Blaker for the respondent. Historically the ecclesiastical courts had no jurisdiction as to custody. Were this power, first given by the Matrimonial Causes Act, 1857, intended to extend to illegitimate children, the contemporary textbooks might have been expected to comment on the matter. No reference to illegitimate children appears in either Shelford or Macqueen and Burn. It is submitted that the particular phraseology, "children

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[13] [1948] P. 19; 63 T.L.R. 358; [1947] 2 All E.R. 50.

[14] [1946] P. 31; 62 T.L.R. 16; [1945] 2 All E.R. 525.

[15] [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346.

[16] 11 P.D. 85; 2 T.L.R. 373.

[17] [1946] P. 31; 62 T.L.R. 16; [1945] 2 All E.R. 525.

[18] [1929] P. 101; 45 T.L.R. 7.

[19] (1786) 1 T.R. 96.

[20] [1953] 1 Q.B. 38; [1952] 2 T.L.R. 711; [1952] 2 All E.R. 812.

"the marriage of whose parents is the subject of proceedings," was introduced into section 35 of the Act of 1857 only because the section refers to nullity; in other sections, where nullity is not mentioned, for instance, section 45, the phrase "the children of "the marriage" is used. Reliance is also placed on the dictum of Lord Denman in *Reg.* v. *Totley (Inhabitants)* [21] that "the law "does not contemplate illegitimacy," on the maxim referred to in *Green* v. *Green* [22] that an illegitimate child "filius nullius est," and on the rule laid down in *Woolwich Union* v. *Fulham Union*,[23] and followed in *Harrison* v. *Harrison*,[24] that the prima facie meaning of the word "child" in a statute is that of "legitimate "child."

[DENNING L.J. The legislature had to find a phrase which was applicable to the children of void or voidable marriages to replace "child of the marriage." The words adopted are wide enough to include the illegitimate children of divorced parents. If the legislature intended divorce and nullity to have different results in this respect, could it not have made its intention clear by creating a separate subsection, as was done in the case of petitions for restitution of conjugal rights: section 26 (2)?]

Whenever the legislature has meant to refer to illegitimate children it has made its intention abundantly clear by defining the word "child" as including illegitimate children or in other ways. The Guardianship of Infants Acts, for instance, use the words "father" and "mother," and section 4 of the Summary Jurisdiction (Married Women) Act, 1895, reads "infant children "whom he [the husband] is legally liable to maintain."

All the other sections of the Act of 1950 referring to children speak of "the children of the marriage." The original Matrimonial Causes Rules contain no provision for custody, and the present rules deal only with the custody of "the children of the "marriage": rule 54 (1). The preamble to the Act of 1857 sets out the purpose of the Act as being "to constitute a court with "exclusive jurisdiction in matters matrimonial." Such an Act cannot be supposed to make provision for illegitimate children.

If the words be taken to include illegitimate children, an anomaly arises in section 7 of the Guardianship of Infants Act, 1886, where the court, on pronouncing a decree absolute or nisi for divorce, is empowered to declare a parent to be a "person unfit

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[21] (1845) 7 Q.B. 596.

[22] [1929] P. 101; 45 T.L.R. 7.

[23] [1906] 2 K.B. 240.

[24] [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346.

"to have the custody of the children (if any) of the marriage." If the legislature considered that the courts had any power to make an order for the custody of an illegitimate child it is inconceivable that it should have intended to exclude such a child from the provisions of this section.

It is, moreover, desirable to look at the consequences which would follow from allowing this appeal. The child of an adulterous mother is presumed to be the legitimate child of the first marriage. Should a court, which later dissolves her subsequent marriage with the adulterer, have power to grant custody of the child which was then said to be the illegitimate child of the second union, this would amount to a judgment affecting the status of the child and such judgments might be given up and down the country in undefended suits. For this reason also, it is submitted that this appeal should not be allowed.

Latey, in reply. Reliance is placed on *Curtis* v. *Curtis*,[25] decided immediately after the original Act came into force, and in which Sir C. Cresswell referred to the purpose of the section as being "to provide for the custody, maintenance, and education "of the children of the parties," and on *Marsh* v. *Marsh*,[26] a contemporary case in which it was said that the power given by the new Act exceeded that previously exercised by the courts of law and equity. Those cases show that the courts, at the time of the passing of the Act, understood that the intention of the legislature was to give the section a liberal meaning.

DENNING L.J. This appeal has been brought with the avowed intention of challenging the authority of *Harrison* v. *Harrison*.[1] [His Lordship stated the facts, referred to section 26 (1) of the Matrimonial Causes Act, 1950, and continued:] The matter depends on section 26 (1) of the Matrimonial Causes Act, 1950, which repeats a series of sections in substantially the same form ever since section 35 of the Matrimonial Causes Act, 1857. According to *Harrison* v. *Harrison*,[1] the word "children" in section 26 (1) does not apply to illegitimate children. It applies only to legitimate children, that is, to children of the petitioner and respondent born in lawful wedlock or legitimated by subsequent marriage. The child in the present case was born illegitimate, and it was not legitimized by the subsequent marriage of its parents because the father was married to a third person when it was born: see section 1 (2) of the Legitimacy Act, 1926.

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[25] (1858) 1 Sw. & Tr. 192.

[26] (1858) 1 Sw. & Tr. 312.

[1] [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346.

C. A.
1953

PACKER
v.
PACKER.

Denning L.J.

I see no reason for confining the section to legitimate children. On the contrary, there are strong reasons why it must extend to illegitimate children as well as legitimate children. That is shown by the fact that the section applies not only to proceedings for divorce but also to proceedings for nullity. It applies, for instance, to nullity on the ground of affinity, bigamy or want of form; and the court can make provision for the children of incestuous or bigamous or invalid marriages, although those children are clearly illegitimate: see *Langworthy* v. *Langworthy.*[2]

Once the word "children" in the section is interpreted so as to include illegitimate children, then the jurisdiction of the Divorce Court to make provision under section 26 (1) depends on three requisites being fulfilled: (i) the application must be made in "proceedings for divorce or nullity of marriage or judicial "separation"; (ii) the application must relate to "children," legitimate or illegitimate; and (iii) "the marriage of the parents" of those children must be "the subject of the proceedings." When the section is analysed in that way it is clear that the test of jurisdiction is parenthood, not legitimacy. Mr. Blaker conceded that in proceedings for nullity the test was parenthood, but he argued that in proceedings for divorce or judicial separation the test was legitimacy. I cannot see the slightest justification for that dichotomy. There is nothing in the wording of the section to support it. If the matter is tested by trying to write out the section in full with that dichotomy inserted into it, you would soon give up the attempt and insist on dividing the section itself into distinct parts, one part dealing with proceedings for divorce or judicial separation, the other part dealing with proceedings for nullity.

It is, moreover, worth noticing that in subsection (2), which is concerned with restitution of conjugal rights, the words used are not "children of the marriage," which is the accepted way of denoting legitimate children, but "children of the petitioner "and respondent," which words are apt to make parenthood the test also in that case. On the strict construction of the section, therefore, the Divorce Court has jurisdiction to make provision for an illegitimate child of the parties, provided that they are its parents. I am not inclined to insist upon a strict construction of an Act of Parliament if reason and good sense point to a different construction; in this case, however, reason and good sense go hand in hand with the strict construction.

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[2] 11 P.D. 85; 2 T.L.R. 373.

Mr. Blaker concedes that the Chancery Division or the county court or the magistrates can make provision under the Guardianship of Infants Acts, 1886 and 1925, in respect of illegitimate children. All he says is that the Divorce Court cannot do it. Just see what this means. Take the familiar case where a single woman lives with a married man and has a child by him. He afterwards gets a divorce from his previous wife and marries the single woman, and they have three more children. The Divorce Court has full jurisdiction in respect of the three children born after marriage, but none, it is said, over the child which was born to them before marriage. The parties have to go to the Chancery Division to deal with that one. What a waste of money this is. That one child could well have been provided for by the Divorce Court at the same time as the other three, and, indeed, better provided for, because the Divorce judge will have seen the parties and will know all about them. Yet it is said that the parties must go to the expense of separate Chancery proceedings, and instruct a Chancery judge by fresh affidavits, and get his order about this one child whilst the Divorce judge is dealing with the other three. Surely the sensible and the practical thing is for the judge who tries the divorce case to make provision at one and the same time for all the four children of the parties, as well for the illegitimate one as for the three legitimate ones. The wording of the Act of Parliament permits the Divorce judge to do this, and I do not think that we should stand in the way.

What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both. There is no decision of this court that an order cannot be made for custody of an illegitimate child; and in the absence of direct decision preventing us, I think that we should follow the course which is permitted by statute and prescribed by good sense. I realize that there is a dictum of the Divisional Court in *Colquitt* v. *Colquitt* [3] and a rule of court (rule 54 (1) of the Matrimonial Causes Rules, 1950) which assume that section 26 is confined to legitimate children; but the present case is brought to test the validity of this assumption. If it is shown to be wrong, we should not hesitate to say so.

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[3] [1948] P. 19; 63 T.L.R. 358; [1947] 2 All E.R. 50.

There was one point made by Mr. Blaker, however, which deserves to be mentioned. It is best shown by an illustration. Suppose that a married woman gave birth to a child and afterwards admitted that it was not the child of her husband but of the co-respondent; then suppose that she was divorced and married the co-respondent and they took the child to live with them. If she afterwards divorced the second husband and obtained in those proceedings an order for custody of the child, that would, it is said, amount to a finding that the child was not the child of her first husband but of the co-respondent, and this might operate to the prejudice of the child, because it would amount to a finding of illegitimacy. The answer to this point is, however, this: an order for custody is an order in personam as between the two parties to the proceedings, and does not operate in rem so as to affect the status of the child. The order of the court in the case mentioned is no more prejudicial to the child than the previous admission of the mother. Even had the mother made no prior admission, but made it only on the application for custody, that would not prejudice the child more than any other admission which she might make about the paternity of her child. It would be no more prejudicial than a like order made by the Chancery Division. The objection is therefore without foundation.

I have now dealt with all the points made by Mr. Blaker. None of them touches the crucial matter, which is the true construction of section 26 (1) of the Act of 1950. That section plainly gives jurisdiction to the Divorce Court, and we should uphold that jurisdiction, especially when it is so just and convenient and saves so much expense. We should not send the parties off to the Chancery Division.

I would therefore allow this appeal.

MORRIS L.J. stated the facts and continued: The issues raised in this appeal depend upon the construction of section 26 (1) of the Matrimonial Causes Act, 1950. That subsection is the ultimate successor of section 35 of the Matrimonial Causes Act, 1857. Neither the original wording of section 35 nor such changes of wording as have taken place, namely, in section 4 of the Matrimonial Causes Act, 1859, section 6 of the Matrimonial Causes Act, 1884, and section 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, throw light on the present problem. It is to be noted that even in the case of children in regard to whom the jurisdiction is beyond question, the court is empowered to direct, if it thinks fit, that proper proceedings be taken for placing the children under the protection of the court. The consideration of main importance is that in section 35 of the Act of 1857, as in section 26 (1) of the Act of 1950, the words "the custody, maintenance and education of the children, the "marriage of whose parents is the subject of the proceedings" are to be found. The question to be determined is whether in the context the word "children" includes those who at the time are illegitimate.

In *Woolwich Union* v. *Fulham Union*,[4] Vaughan Williams L.J. referred in his judgment to the technical rule of law that when the words "child" or "children" occur in a statute, the prima facie meaning is legitimate child or legitimate children. He proceeded to say[5]: "It is of course true that that is only prima "facie the meaning to be given to the word, and that a wider "meaning may, in the case of some statutes, be given to it, so as "to include an illegitimate child or illegitimate children, where "that meaning is more consonant with the object of the statute." Then, having given his view as to the meaning to be ascribed in the enactment then in question, he continued[5]: "But, apart "from that consideration, there is another reason why I should "hesitate so to construe it. A long time has now elapsed since "1846 and during all that length of time numerous cases must "have occurred in which the question whether the proviso to "section 1 of the Act was applicable to an illegitimate child "might have been raised; but, apparently, there is no case in the "books in which that point was raised. . . ."

If the wording of section 26 (1) is clear then, of course, it must be given full effect, but it is not without some significance that in a situation which could so very often have arisen since 1857 there is no trace, until comparatively recently, of the point having been taken that, on a dissolution of marriage, there may be orders for maintenance and custody of illegitimate children if the parties assert and admit that they are, in fact, the parents of those children.

It may well be that it would on occasion be very convenient if on a decree of divorce the court could make orders as to the custody, maintenance and education of those acknowledged by the parties to be their illegitimate children. But considerations of convenience are for the legislature. The question for the court is one of construction of the Act. It is to be noted that it was provided by section 7 of the Guardianship of Infants Act,

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[4] [1906] 2 K.B. 240.

[5] Ibid. 246, 247.

1886, that in any case where a decree for judicial separation or a decree, either nisi or absolute, for divorce shall be pronounced, the court pronouncing such decree may thereby declare the parent, by reason of whose misconduct such decree is made, to be a person unfit to have the custody of the children (if any) of the marriage. If by the then existing law the court had power to deal with the custody, maintenance and education of all children of the parties whether legitimate or not, it is difficult to see why the power given by section 7 of the Act of 1886 should only have been given in reference to the children of the marriage.

In my judgment, the phrase in section 26 (1) of the Act of 1950, " the children the marriage of whose parents is the subject " of the proceedings " has reference to the children of a " marriage," using inverted commas, so as to include and comprehend cases where the " marriage " may be declared not to have been a marriage. It seems to me that the reason why the phrase " children of the marriage " was not employed was that the mention of proceedings for nullity of marriage rendered such a phrase inappropriate. In section 23 (1) of the Act of 1950 the phrase " infant children of the marriage " is to be found; in section 24 (1) and (2) occur the phrase " the children of the " marriage or either or any of them "; in section 30 (3) the phrase " the children, if any, of the marriage " is used. If the court under section 26 (1) has power to deal with the custody, maintenance and education of all children of the parties whether legitimate or not, it seems to me that some, or all, of the powers of the court under sections 23, 24 and 30 would not have been limited so as to be referable only to the children of the marriage.

The view which I have formed is, I think, supported by the language of Cotton L.J. in *Langworthy* v. *Langworthy*.[6] In that case the marriage in fact solemnized was declared to be null and void as not having been solemnized according to law. In reference to section 35 of the Act of 1857, Cotton L.J. said [7]: " Now does " the enactment apply to this child although there was no valid " marriage? I am of opinion that it does. The section refers to " the children not ' of the marriage ' but ' the marriage of whose " ' parents is the subject of such suit or other proceedings.' The " section includes sentences of nullity of marriage, and must, " therefore, in my judgment, be considered as enacting that in " cases where there is no valid marriage the children of the union " may be provided for."

[6] 11 P.D. 85; 2 T.L.R. 373.

[7] 11 P.D. 88.

C. A.
1953

PACKER
v.
PACKER.

Morris L.J.

In my judgment, section 26 (1) of the Act of 1950 refers to the children of the "marriage" union even where such "marriage" is declared to be null and void.

For the reasons which I have given I find myself in agreement with the judgment of Barnard J. in *Harrison* v. *Harrison* [8] and I would dismiss this appeal.

DENNING L.J. The court being equally divided in opinion, the decision of the judge below will stand and the appeal will be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *J. A. H. Powell, the Law Society, London, for J. M. Gregory-Jones, the Law Society, Newcastle-upon-Tyne; Helder, Roberts, Giles & Co., for Hodding, Jackson & Co., Salisbury.*

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[8] [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346.

1953
Apr. 1.

Karminski J.

WYATT *v.* WYATT (BY HER GUARDIAN AD LITEM).

Husband and Wife—Divorce—Incurable insanity—Detention as temporary patient—Subsequent admission as voluntary patient—Short absence on trial—Notice of discharge signed in error during absence—Discharge a nullity—Mental Treatment Act, 1930 (20 & 21 *Geo.* 5, *c.* 23), *s.* 5 (14)—*Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 1 (1) (*d*), 2 (*a*), (*d*)—*Mental Treatment Rules*, 1930 (S.R. & O. 1930, *No.* 1083), *rr.* 5, 39.

A respondent wife, who was incurably of unsound mind, had been admitted to a mental hospital in December, 1946, on the application of her husband, for temporary treatment. The period was later extended, and before the order expired the husband took the wife home on trial in the hope that an improvement would be effected. Some two weeks later she was re-admitted to the hospital, where she remained as a voluntary patient until a petition for divorce was presented by the husband in June, 1952. During her absence on trial, however, the medical superintendent signed a notice of discharge without the authority of the husband, and in error, which he later amended to read "discharged relieved":—

Held, that the notice of discharge was in the circumstances a nullity, that there had accordingly been no interval between the period of detention as a temporary patient and the treatment as a voluntary patient, and that a decree nisi should be granted.

PETITION for divorce.

The parties were married in 1932. On December 27, 1946, after an illness lasting for some years, the wife was admitted to a mental hospital as a private temporary patient on the application of the husband, and after examination by her doctor and the superintendent of the hospital, in accordance with the provisions of section 5 of the Mental Treatment Act, 1930.[1] She remained there as a temporary patient until June, 1947, when the period of temporary treatment was extended on the husband's application for a period not exceeding three months, on the direction of the Board of Control in pursuance of section 5 (13) of the Mental Treatment Act, 1930.[2] A similar extension of three months was ordered from September 27, 1947; but on November 18, 1947, the wife was allowed to go home on trial at the husband's request as allowed for by the provisions of the Mental Treatment Rules, 1930,[3] in the hope that the change might improve her condition.

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[1] Mental Treatment Act, 1930, s. 5 (1): "Subject to the provisions of this "section, a person who is suffering "from mental illness and is likely to "benefit by temporary treatment but "is for the time being incapable of "expressing himself as willing or "unwilling to receive such treatment "may, on a written application duly "made in accordance with the provi-"sions of this section but without a "reception order, be received as a "temporary patient for the purpose "of treatment . . ."

S. 5 (11): "Subject to the provisions "of this section a person received as a "temporary patient may be detained "for a period not exceeding six months "but shall not be detained as such for "any longer period."

[2] Mental Treatment Act, 1930, s. 5 (13): "Where it is anticipated that a "person who is undergoing treatment "as a temporary patient under this "section will not recover within the "period of six months, but his early "recovery appears reasonably pro-"bable, that period may from time to "time be extended for further periods "of such length not exceeding three "months as may be specified in direc-"tions given by the Board of Control "upon the application of one of the "persons mentioned in subsection (2) "of this section, made in such form "and accompanied by such evidence "or recommendations as the Board "may by rules made under section 338 "of the principal Act prescribe, pro-"vided that such further periods shall "in no case exceed six months in "all."

[3] Mental Treatment Rules, 1930. r. 5: "Subject to the provisions of "section 5 of the [Mental Treatment] "Act, [1930,] the person in charge of "an institution, hospital or nursing "home may permit a temporary "patient to be absent on trial or for "the benefit of his health for such "period as the person in charge thinks "fit: Provided that before permission "is granted to a private patient, the "approval in writing of the person "having authority to discharge the "patient shall be obtained unless, in "the opinion of the person in charge, "there is adequate reason for dis-"pensing with such approval." (The rules of 1930 were replaced on July 5, 1948, by the rules of 1948 (S.R. & O. 1948, No. 1071), rr. 4 and 23.)

The following entry was made in her record by an assistant to the superintendent: "She has gone home today and if she settles "down satisfactorily she will be discharged."

On November 24, 1947, a letter purporting to be signed by the medical superintendent was written to the husband in the following terms: "As your wife has now been at home for nearly "a week, we are today discharging her from our books"; and a note was made by the assistant in her record that she had been "discharged as relieved today." The Board of Control was informed by a notice of discharge dated November 25, 1947, that the wife had been discharged on November 24, 1947, on the authority of the husband. No such authority, or other authority, had in fact been given as required.[4] The ground of discharge, namely, "discharged recovered," or "discharged relieved," or "discharged not improved," was inadvertently omitted from the form, which was returned by the Board of Control. The word "relieved" was then inserted by the medical superintendent, who signed a letter on November 26, 1947, informing the board that "relieved" should have been included.

The trial was unsuccessful, and on December 3, 1947, the wife (who had occasional lucid intervals) signed a form saying that she was willing to undergo treatment at the hospital. She was received as a private voluntary patient on December 4, 1947, and the appropriate notice was given to the Board of Control. She was still a voluntary patient at the hospital when the husband presented his petition for divorce under section 1 (1) (*d*) of the Matrimonial Causes Act, 1950,[5] in June, 1952. Evidence was given and accepted by the court that in the existing state of medical knowledge there was no prospect of recovery.

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[4] Mental Treatment Rules, 1930, r. 39: "Discharge of private temporary patient. (1) A private temporary "patient detained in an institution, "hospital or nursing home, or under "care as a single patient shall be "discharged if the person on whose "application the patient was received "as a private patient by writing "under his hand so directs."

(2) [As in s. 72 (2) of Act of 1890, infra.]

"(3) If there is no person qualified "to direct the discharge of a patient "under this rule, or no person able "and willing to act, the board may "order his discharge."

By s. 5 of the Mental Treatment Act, 1930: "(14) The Board of Trade "may at any time order—(i) that "any person received as a temporary "patient shall be discharged; or (ii) "that steps shall be taken to deal with "him under the principal Act as a person of unsound mind. (15) Without "prejudice to the provisions of the "last two preceding subsections [for "subsection (13) see note 2, supra], "the provisions of sections 72 to 74, 76 "to 80 and 82 and 83 of the principal "Act (which relate to the discharge "of persons of unsound mind detained "under that Act) shall apply to any "person received as a temporary "patient under this section as they "apply to persons detained under that "Act, subject, however, to such modifications and adaptations as may "be prescribed by rules made under "section 338 of the principal Act."

By s. 72 of the Lunacy Act, 1890: "(1) A private patient detained in "an institution for lunatics, or under "care as a single patient, shall be "discharged if the person on whose "petition the reception order was "made by writing under his hand so "directs. (2) If that person is dead "or incapable . . . [other specified "persons may give the direction for "his discharge]. (3) If there is no "person qualified to direct the discharge of a patient under this section, "or no person able or willing to act, "the commissioners may order his "discharge."

The wife, by the Official Solicitor as her guardian ad litem, denied in her answer to the petition that she was incurably of unsound mind and/or that she had been continuously under care and treatment during the relevant period. It was further alleged (a) "that she was discharged from her temporary status with "effect from November 24, 1947, and not re-admitted as a "voluntary patient until December 4, 1947"; (b) "further or "alternatively that she was not discharged from her temporary "status on December 4, 1947"; (c) "further or alternatively "that she was not admitted as a voluntary patient on December "26, 1947 [i.e., three months after the extension of September, "1947], or at all."

It was not contended on her behalf that the order for temporary detention was not an order within the meaning of subsection (2) (*a*) of the Matrimonial Causes Act, 1950[5]; but it was contended on behalf of the husband that the wife's admission as a voluntary patient followed immediately upon her treatment under a temporary order so as to come within the provisions of subsection (2) (*d*) of the Act.[5]

J. E. S. Simon Q.C. and *Victor Williams* for the husband. The direction of June, 1947, constituted an order within the meaning of section 1 (2) (*a*) of the Matrimonial Causes Act, 1950[5]: see *Benson* v. *Benson*.[6] The real difficulty in this case arises from the purported notice of discharge dated November 25, 1947. It is submitted that that notice was a nullity, and did not break the period of care and treatment, because there was no proper application for a discharge. The only persons who could have made such an application would be the Board of Control under section 5 (14) of the Mental Treatment Act, 1930,[7] and rule 39 (3) of the Mental Treatment Rules, 1930,[7] the husband under rule 39 (1) of those rules,[7] or the visitors under rule 44. The superintendent had no power to discharge a patient on his own initiative unless that patient had recovered.

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[5] Matrimonial Causes Act, 1950, s. 1 (1): ". . . a petition for divorce "may be presented . . . on the ground "that the respondent . . . (*d*) is incurably of unsound mind and has "been continuously under care and "treatment for a period of at least "five years immediately preceding the "presentation of the petition."

S. 1 (2): "For the purposes of this "section a person of unsound mind "shall be deemed to be under care and "treatment—(*a*) while he is detained "in pursuance of any order or inquisition under the Lunacy and Mental "Treatment Acts, 1890 to 1930; . . . "(*d*) while he is receiving treatment "as a voluntary patient under the "Mental Treatment Act, 1930, . . . "being treatment which follows without any interval a period during "which he was detained as mentioned "in paragraph (*a*) . . . of this subsection; and not otherwise."

[6] [1941] P. 90; 57 T.L.R. 578; [1941] 2 All E.R. 335.

If (as is submitted) the "discharge" of November 25, 1947, was a nullity, there was no break in the period of care and treatment during the wife's absence at home on trial: *Safford* v. *Safford*.[8] The extension made on September 27, 1947, was therefore still running on December 4, 1947, when the wife was received as a voluntary patient.

Stuart Horner for the Official Solicitor, as guardian ad litem, submitted that the evidence did not establish that there had been no break in the detention, and that in such circumstances *Benson* v. *Benson* [9] was inapplicable. He further submitted that if the purported discharge was a nullity, then there was no document of discharge of the wife's temporary detention and no proper notice of admission as a voluntary patient. The wife was still a temporary patient on December 4, 1947, and remained so until the end of the three months' period on December 27, 1947, and there was no notice of discharge and re-admission at that date.

Simon Q.C. in reply.

KARMINSKI J., stating the facts, said that the real point of the case was whether the wife had in fact been discharged from temporary treatment on November 24 or 25, 1947. His Lordship emphasized the devotion of the husband to the wife, who had done everything he could for her, and continued: The medical superintendent gave evidence before me and took the blame [in respect of the "discharge" in November, 1947] wholly on himself. He described the signing of both the letter and the notice to the Board of Control as gross carelessness on his part. I hesitate, very much indeed, to use such censorious language of his conduct in the matter. It is easy to see what happened. It is a large hospital of 150 patients and there must be many documents which have to be dealt with in the course of a week. What happened in this case, I think, was this: the wife had been let out on trial as permitted by the statutes and it was hoped, rather against hope, that she might recover sufficiently to be discharged and the case was noted accordingly. A zealous secretary appears to have filled in the form and drafted the letter, which the medical superintendent signed per incuriam, as I prefer to put it—not through "gross carelessness."

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[7] See note 4, supra.

[8] [1944] P. 61; 60 T.L.R. 439; [1944] 1 All E.R. 704.

[9] [1941] P. 90.

It was argued with force by Mr. Horner that the Board of Control pointed out another irregularity in the notice of discharge, because the ground of discharge was not set out in the document, and they returned it to the superintendent who still, I think, a little absent-mindedly, put in in ink the word "relieved" as a ground for discharge. I feel, without the least desire to be in any way critical or offensive to him, that he did not really apply his mind very carefully to these two documents, and he says so in the frankest terms.

On the evidence before me I have no doubt whatsoever that in the present state of medical knowledge the wife has no prospect of recovery from her present mental disorders. She has been under treatment for a very long time, she has a long history of mental disorders, and I am quite satisfied that the opinion given, without hesitation, by the medical superintendent is the correct one.

I have to consider what the husband has to prove in a case of this kind. Under section 1 (1) (*d*) of the Matrimonial Causes Act, 1950, the court can grant a decree on the ground that the respondent "is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition." Five years in this case must, of course, go back to June, 1947. The care and treatment requirements are defined by subsection (2) of section 1 of the Matrimonial Causes Act, 1950. [His Lordship read the relevant parts of the subsection.[1]] It is not contested on behalf of the Official Solicitor that the order for temporary treatment was not an order for detention within the meaning of subsection (*a*). That point was decided in the case of *Benson* v. *Benson*.[2] It is contended on behalf of the husband that the wife's admission as a voluntary patient followed immediately upon her treatment under a temporary order, and I come now to what seems to me the main point in this case: was the notice of discharge signed by the medical superintendent on November 25, 1947, a discharge within the statute, or was it a nullity? I am bound to say, without any real hesitation, that I think that it was a complete nullity.

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[1] See note 5, supra.

[2] [1941] P. 90.

The statutes dealing with persons of unsound mind are full and complex and must be strictly applied. The provisions for temporary treatment without certification are contained in section 5 of the Mental Treatment Act of 1930. That is a very long section with 17 subsections, in turn each of some length, but they define the powers to discharge a person received as a temporary patient. By subsection (14): "The Board of Control may at any time "order—(i) that any person received as a temporary patient shall "be discharged; or (ii) that steps shall be taken to deal with him "under the principal Act as a person of unsound mind." The subsection of the Act of 1930, which relates back to the section of the principal Act, provides that the person who applied for their temporary treatment can also apply for their discharge.

I turn now to the rules made under the Act of 1930. Under rule 39 (1) of the Mental Treatment Rules, 1930, it is laid down that "a private temporary patient detained in an institution, hos-"pital or nursing home or under care as a single patient, shall "be discharged if the person on whose application the patient "was received as a private patient by writing under his hand so "directs." By paragraph (3) of the rule: "If there is no person "qualified to direct the discharge of a patient under this rule, "or no person able and willing to act, the Board may order his "discharge." There is to my mind no doubt that the only people who can get the discharge of a temporary patient are (a) the applicant, in this case the husband, or (b) the Board of Control. The Board of Control certainly did not apply for the discharge nor, in fact, did the husband, although the notice of discharge given to the Board of Control quite wrongly says that the discharge was effected "on the authority of"—and there were typed in the words "the applicant." That was quite wrong.

I am satisfied, and indeed it has never been suggested otherwise, that the husband never here asked for the wife's discharge as a temporary patient. What he did do was to get her sent out on trial under a quite different section. It is not contended that absence on trial which is, in fact, part of the treatment, breaks the sequence of detention.

It is argued also by Mr. Horner, on behalf of the Official Solicitor, that even if there was no effective discharge, then the notice of admission of December 4, 1947, was invalid, as the respondent wife was still detained as a temporary patient up to December 27, 1947. I am bound to say that I have some difficulty in following the force of that argument. On the view which I have taken of this matter the order of discharge purported to have been made was a nullity and the wife remained a temporary patient under the valid existing order. The fact that she signed a consent on December 3, 1947, to be a voluntary patient and was, in fact, received back into the hospital as a private voluntary patient on December 4, 1947, does not, in my view, affect the situation at all. If there was no proper discharge on November 25, 1947, then the temporary treatment came to an end on December 27, 1947, and not, as I think, on December 4, 1947; but the fact that she had applied and, in fact, did come back to the hospital on December 4, 1947, as a voluntary patient, did not terminate the temporary treatment but merely made her continue after December 27, 1947, as a voluntary patient, and I believe that to be the true position.

That is my view of this case. It is a somewhat novel point which we have had to discuss, and I think it was rightly contested and argued on the wife's behalf by the guardian ad litem; but once I have come to the conclusion that the purported discharge in November, 1947, was a nullity, I see no further difficulty in the case.

I have already said that I never had any difficulty in this case about the prognosis of this unfortunate woman's condition, and I find that the husband has proved the contents of his petition and I pronounce a decree nisi accordingly.

Decree nisi.

Solicitors: *Withers & Co.; Official Solicitor.*

J. B. G.

BAKER *v.* BAKER.

1953
Oct. 14.

Lord
Merriman P.
and
Pearce J.

Husband and Wife—Justices—Desertion—Constructive Desertion—Reasonable belief in adulterous association.

If a husband deliberately induces in his wife the belief that he is carrying on an adulterous association, and his wife leaves the matrimonial home in consequence, he can be held to have expelled her and, therefore, to have deserted her, even though she fails to bring a charge, or to prove the fact, of adultery.

Glenister v. *Glenister* [1945] P. 30; [1945] 1 All E.R. 513 applied.

APPEAL from Mr. Clyde Wilson, sitting at the South Western Magistrates' Court on February 20, 1953.

The parties were married in 1947, and separated in July, 1952, the wife being the one to leave the matrimonial home, a caravan. She did so after her husband had been associating over a period with a named woman. On a summons for desertion the magistrate found: "Adultery not proved, but satisfied wife "had reasonable grounds for suspecting that he had committed "adultery"; and after referring to *Glenister* v. *Glenister*,[1] he made an order on the ground of desertion. An intimation had been given to the husband before the hearing of the summons that adultery would be alleged.

The husband appealed.

The nature of the association is analysed in the judgment together with the effect of other unkind conduct.

Miss Morgan Gibbon for the husband. The magistrate based his decision on *Glenister* v. *Glenister*[1]; but that case is no authority for holding that a husband can be held to have deserted his wife in circumstances such as those of the present case. In *Glenister* v. *Glenister*[1] it was held that a husband who, by reason of his wife's conduct, genuinely believed her to have committed adultery was justified in living apart from her; and his belief afforded him a good defence to a charge of desertion or a petition for restitution of conjugal rights. In the present case the magistrate misapplied the principles enunciated in *Glenister* v. *Glenister*.[1] While the wife here may have been justified in living apart from her husband for so long, and only for so long, as she entertained a bona fide belief that he had committed adultery, it could not be said that by inducing that belief he had deserted her. In any event, as the magistrate found that adultery was not proved, there was no longer any room for the belief; and therefore desertion, if it ever had existed, must have come to an end.

K. Bruce Campbell for the wife was not called upon.

LORD MERRIMAN, P. This is a husband's appeal from a decision on February 20, 1953, by Mr. Clyde Wilson, sitting at the South Western magistrates' court, that he had deserted his wife. On that basis the husband was ordered to pay maintenance at the rate of £2 15s. a week. There has been no appeal on the question of amount, and that is, perhaps, not surprising, for the husband in his evidence said that he was earning just over £500 a year. The sole question is whether the finding of desertion is justified.

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[1] [1945] P. 30; [1945] 1 All E.R. 513.

The parties were married in February, 1947. At the time when the separation occurred, in July, 1952, they were living together in a caravan on a site at Merstham. The separation occurred because the wife left the caravan. At a later date she took the caravan, which she said was hers, away, so that the physical home was not merely vacated but removed by the wife.

The legal question is, who was it who broke up the matrimonial home in the real sense of the word? The magistrate has found that the husband did. We have nothing but a short and rather cryptic statement of the reasons for the decision, in which he says: " Adultery not proved, but satisfied wife had reasonable " grounds for suspecting he had committed adultery. *Glenister* " v. *Glenister*." [1] To make that statement of the reasons intelligible, it is necessary to point out that the wife, although charging her husband with desertion (in effect with constructive desertion, on the ground that she had been, as she asserted, driven from the matrimonial home), had given notice through her solicitor a few days before the hearing " that in compliance with " the recent ruling of the High Court, we are now intimating to " you that it may be necessary to produce evidence of adultery " between you "—(that is, the husband)—" and "—(a certain woman)—" at Banstead in Surrey and various other places " between January, 1951, and April 29, 1952, in the forthcoming " proceedings for desertion between your wife and yourself in the " South Western magistrates' court." What the wife was in effect saying was that she had objected (and there was evidence about this), in circumstances to which I will refer more particularly in a moment, to what she believed to be an improper association between her husband and this woman, and that when it had been persisted in and lied about, as she asserted, she had withdrawn from cohabitation. The suggestion was that she did so as the only thing a decent woman could do. In my opinion the magistrate was justified in saying, as a matter of law, that if a man (I am putting it hypothetically now), deliberately induces the belief that he is carrying on an adulterous association, and his wife leaves the matrimonial home in consequence, he can be held to have expelled her, and, therefore, to have deserted her, even though she fails to bring a charge, or to prove the fact, of adultery.

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[1] [1945] P. 30; [1945] 1 All E.R. 513.

But in this case there is in my opinion a simpler approach, because there is a great deal of evidence which is wholly unconnected with that factor though it may be explained by the concurrence of an improper association which is continuing; and I myself should have thought that the simplest method of approaching this case was to find that the wife's story was true and the husband's story untrue, not only in relation to the association with this woman, but generally, and that the facts as a whole amply warranted holding that the wife had been expelled from the home. It is pointed out that that is not, in terms, the finding, and it is true that we have no finding on the other matters. It is said that there is nothing whatever to show that the magistrate accepted the wife's story and did not accept the husband's. I am afraid that I find it impossible to accept that argument, because it is clear that this question of the association loomed very large, and the magistrate has come down quite definitely on the side of the wife on that topic, although he has found that, in fact, adultery was not proved. But he has found that he was satisfied that the wife had reasonable ground for suspecting the adultery, and he could not have arrived at that conclusion without accepting the wife's story and disregarding some of the evidence directed to that issue which the husband is recorded as having given.

The wife's case, apart from the issue of her suspicions, to which I will return in a moment, was that although matters had been all right for a time the husband had been refusing sexual intercourse coincidentally with some of the facts which made her suspicious about the other woman, on excuses which did not appear to her to be very convincing: he was telling her—true, to some extent in connexion with her suspicions about his conduct—that she was going mad, which is, taken by itself, apart from the context, the sort of remark which is about as wounding as can well be imagined, and he supplemented that, and admitted that he had made some such remark, by saying that she would go the way of her mother and her aunt. We do not know what happened to the mother. It may be that she had gone to a mental home, but that is only hypothesis. But about the aunt there is no doubt. What the husband was suggesting was that

1953

Baker
v.
Baker.

Lord Merriman P.

she was supposed to have committed suicide, and he was suggesting to his wife that that is what she would be doing. Moreover, there is conflicting evidence in connexion with a bottle of sleeping tablets. The wife said that he had told her to take the lot; he said that he had removed the lot in case she did take them. There is other evidence, into which I need not go in detail, of wounding remarks, and certainly evidence from which a court could readily infer that the husband was only too anxious to get his wife out of the matrimonial home.

But in the background of all these other matters (and I now come back to the subject which loomed so large in the case), there was this association. The wife had noticed that on many occasions the husband came home scented; after he had given her a particular account of the way in which he had spent his evening before a rendezvous with her she found that the speedometer of the car, of which she had taken note, showed that he had travelled ten miles more than that particular journey could account for; and, in a word, things came to a head when she became aware that her husband was taking this particular woman out in the car. And on April 29, 1953, the date which is mentioned in the particulars and in the evidence, she burst into the car, accompanied by a friend, and found the husband and this woman sitting together on the front seat. They were also shown by other evidence to have been out together on later occasions, in spite of the wife's very manifest objection, plainly expressed, to what she and her friend had discovered on that date.

In my opinion there was ample evidence that this association was going on. I assume, of course, that the magistrate found that adultery was not, in fact, committed; but I take two or three lines from the husband's cross-examination. Reading between the lines, he was asked, in effect, whether he and this woman had been together or within reach of each other during a holiday in Cornwall. He said that he did not remember going to Looe in Cornwall: not, I should have thought, a very convincing form of answer! He either had been there or he had not, but he did not remember that he had been there, and he did not stay there, but oddly enough, the woman may have been down there at the same time. Well, if he does not remember that he was there, and if he did not stay there, I do not know what the "same time" was. I will say no more than this, that there was some evidence that he and the woman were down there at the same time, and he cannot be surprised that that is the inference which the magistrate drew from that kind of evidence. In the next sentence he said: "I visited Looe" (the place which he does not remember to have been at, at which he did not stay, but at which she may have been at the same time) "I do not "know where she was staying. I met her in Exeter one day. I "did not go to West Looe." And then there was a still more striking coincidence: the very first time that he had taken this woman out to luncheon was the very date on which the wife and her friend had burst into the car. Then he went on about the sleeping tablets, which he destroyed because he "thought the "wife might overdo it," and said that he had not told her to take the lot. He admitted that he had told her she was going mad, and he believed that her aunt had committed suicide; but he had the courage to say that he did not think that by making that kind of remark to his wife he would be likely to distress her.

I should be prepared, on the evidence as a whole, to draw the inference which the magistrate has not directly expressed, that this man had been guilty of conduct which could fairly be held to have expelled his wife from the home; but in justice both to counsel and to the argument which has been addressed to us by Miss Gibbon, I must also deal with the specific point on which the magistrate decided this case, namely, that although he was not satisfied that adultery had been proved, he found that the wife had reasonable ground for suspecting that her husband had committed adultery, and he based his decision on *Glenister* v. *Glenister.*[1] I am not going over the whole case again, but *Glenister* v. *Glenister*[1] was a case in which a wife had charged her husband with desertion in a magistrate's court. The husband's answer in effect was, "Well, she convinced me by "her conduct that she was committing adultery, and in those "circumstances I could not be expected to stay. Therefore I "am not a deserter." That view was supported by this court, in spite of the fact that he was not able to give in evidence one of the essential ingredients in his belief that she had committed adultery because the rule in *Russell* v. *Russell*[2] was still in force. Without going into unnecessary detail, he tried to get round that difficulty by a circumstantial inference from alleged communication of venereal disease. But the point is that this court decided as a matter of principle, to quote the head-note, which quite accurately states the effect of this part of the judgment, that "Although a husband may not be able to prove

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[1] [1945] P. 30; [1945] 1 All E.R. 513.

[2] [1924] A.C. 687; 40 T.L.R. 713.

1953

BAKER
v.
BAKER.

Lord
Merriman P.

"by admissible evidence that his wife has committed adultery, "yet, if the conduct of the wife has been such as to create in the "mind of the husband a reasonable belief that she has been "guilty of a matrimonial offence, he has a sufficient defence to "proceedings based on desertion."

In *Wood* v. *Wood*[3] I gave as an illustration of such conduct on the part of the wife the hypothetical case of a circumstantial confession of adultery by her which afterwards might be proved to be a lie, but which justified the husband in withdrawing from cohabitation so long as it held the field. That view of the matter was upheld first of all in *Everitt* v. *Everitt*[4] by a division of the Court of Appeal in which I happened to be presiding, and was approved by another division of the Court of Appeal in *Allen* v. *Allen*.[5] The point of the last case was that there was at one time a reasonable belief, induced by the wife's conduct, that she had committed adultery; but the issue had subsequently been tried, and it had then been held that the wife had not committed adultery. Hodson L.J., who was sitting with the Master of the Rolls and Jenkins L.J., and who gave the leading judgment, adopted[6] this passage from my judgment in *Everitt* v. *Everitt*[7]: "On that hypothesis the facts were, at the earliest, ascertained at "the moment when the learned judge gave judgment. In *Wood* "v. *Wood*[8] I gave the example of a confession by the wife of "adultery, with every circumstantial detail fully justifying the "husband's belief in the fact that she had committed adultery "and, so long as that belief subsisted, entitling him to withdraw from, or to refuse to resume, cohabitation. There might, "however, come a moment when, in spite of her confession, "or indeed because of her oath that her confession had been "false, the new statement being supported with equally circumstantial detail, a judge might hold that not only was the charge "of adultery not proved but that the wife had not in fact "committed adultery." The next sentence in the passage cited by Hodson L.J. expresses, in my opinion, the point which is decisive in this case: "From that moment the "fact has been ascertained and there is no longer any room "for the belief; but that does not act retrospectively or retroactively. So long as the belief is reasonably and properly held,

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[3] [1947] P. 103; 63 T.L.R. 450; [1947] 2 All E.R. 95.

[4] [1949] P. 374; [1949] 1 All E.R. 908.

[5] [1951] 1 All E.R. 724.

[6] [1951] 1 All E.R. 724, 728.

[7] [1949] P. 374, 380–1.

[8] [1947] P. 103, 107.

"the husband's conduct, and the parties' respective rights in "relation to cross charges of desertion are adjudicated on according to the existence of the belief. There may come a moment "beyond which that is no longer possible." In another passage in his judgment [9] Hodson L.J. emphasised what he described as the temporary nature of this defence. It subsists only until it is displaced by the facts being found in the sense opposite to the belief.

The magistrate has used the decision that in such circumstances a spouse cannot be held guilty of desertion so long as the belief in adultery remains, to justify the proposition that the wife's charge against her husband of desertion cannot be displaced so long as a belief, induced by her husband's conduct, that he was committing adultery, held the field. In other words, he was saying that their respective rights in relation to cross-charges of desertion are regulated by the existence of the belief, a proposition which has twice been held by the Court of Appeal to be right.

In those circumstances, in my opinion, this appeal fails and should be dismissed.

PEARCE J. I agree. There was ample evidence, so far as the facts were concerned, on which the magistrate could arrive at this decision. Indeed, after reading the notes of the evidence I should have been surprised if he had arrived at any other decision. As to the law, I agree entirely with what my Lord has said. The appeal must be dismissed.

Appeal dismissed.

Solicitors: *Lees Smith & Matthew; S. C. Elphick.*

J. B. G.

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[9] [1951] 1 All E.R. 724, 729.

KINNANE *v.* KINNANE.

1953
Oct. 6, 7.

Lord Merriman P. and Pearce J.

Husband and Wife—Maintenance—Justices—Neglect to maintain child only—Power to award maintenance to wife—Desertion—Consent to separation on basis of maintenance continuing—Wife's willingness for husband to go—Married Women (Separation and Maintenance) Acts, 1895–1949.

The underlying basis of the married women summary jurisdiction code is that it is the wife who is the applicant; and it is in favour of the wife that whichever of the permitted orders the court decides to make is made. A court of summary jurisdiction has power under this code to make an order for the maintenance of the wife although the only legitimate finding is that there has been wilful neglect to provide reasonable maintenance for the infant children whom the husband is legally liable to maintain.

APPEAL from Luton justices.

The parties were married in 1940, and a child was born in 1943. In May, 1952, the wife agreed to take the husband back after a separation. There was a further separation in January, 1953, from which arose the present proceedings. She took him back in May, 1952, upon the basis that he agreed to pay housekeeping and maintenance of £6 a week. That amount was reduced to £3 a week, and by January, 1953, the husband was some £15 in arrear. The husband then left the home and thereafter sent £1 a week for the maintenance of the child only. The wife alleged before the justices that the husband had deserted her and had wilfully neglected to provide reasonable maintenance for her and the child; and on February 11, 1953, the justices made an order, on the ground of wilful neglect to maintain, that the husband should pay the wife maintenance of £2 a week and a further 30s. in respect of the child. They dismissed the complaint of desertion on the basis that the parting was not against the will of the wife and was, in effect, a consensual separation.

The husband, to whom the court gave leave to appeal out of time, appealed against the findings in respect both of the wife and the child; but at the hearing of the appeal counsel did not press the appeal in so far as the child was concerned. The wife cross-appealed against the dismissal of the complaint of desertion.

D. R. Ellison for the husband appellant. Even if the finding were justified in respect of the child, there has been no wilful neglect to maintain the wife, for the justices found that the

1953

KINNANE
v.
KINNANE.

parting in January, 1953, was a consensual one, and as there was no finding, nor, indeed, evidence, that the husband had agreed expressly or impliedly to maintain his wife, the justices were wrong in law in finding him guilty of wilful neglect to maintain her: *Baker* v. *Baker* [1]; *Stringer* v. *Stringer.* [2]

T. H. K. Berry for the wife. The justices were wrong in finding upon the evidence that the wife had consented to the separation. The husband had in fact deserted her.

LORD MERRIMAN P. This is a husband's appeal against the decision of the justices for the borough of Luton, who, on February 11, 1953, made an order, on the ground of wilful neglect, that he should pay the wife £2 a week and 30s. a week in respect of the child, the custody of whom was given to the wife. They had before them at the same hearing a summons by the wife alleging that the husband had deserted her. That complaint they dismissed. [Leave was given to the wife to appeal out of time against the dismissal of the complaint of desertion.]

The parties were married in October, 1940. The child, the subject of the custody order, was born three years later, and on January 3, 1953, the spouses parted. It is unnecessary to go into much of the earlier history of what was evidently an uneasy marriage, but it is clear that there had been at least one former parting. This had ended in May, 1952, when the wife, with some reluctance, as is found by the justices, agreed to take the husband back, but upon the basis that he agreed to pay housekeeping and maintenance of £6 a week. Apparently, for one reason or another which does not seem to have been investigated, the amount, in fact, became—it is not clear whether there was any consent—£3 a week, and even on the smaller amount the husband was said at the time of the parting in January, 1953, to be some £15 in arrear. The situation, therefore, was that there was a somewhat uneasy resumption of cohabitation, and that the amount which the husband was actually supposed to be paying by way of maintenance of himself, wife and child, at the time of the parting, was this £3. From the moment of parting he paid nothing except £1 a week, which, I understand, he made clear was solely for the maintenance of the child.

The justices have dismissed the charge of desertion on the basis that the parting was not against the will of the wife, and was, in effect, a consensual separation. From that it is argued that not merely can there be no order on the ground of desertion, as, indeed, there is not, but that the order on the ground of wilful neglect to maintain necessarily falls to the ground because, if it were a consensual separation, there is no finding that there was any agreement, express or implied, that the separation was upon the basis that the husband would continue to maintain his wife. So the order in that respect is said to be bad, except that it is understood that that argument does not prevent the maintenance of the 30s. a week in respect of the child being effective.

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[1] [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81.

[2] [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373.

There is no real difficulty about the law. The difficulty in this case is to see what is the proper inference from facts which are, to a large extent, not in dispute. It is necessary at the outset to remind ourselves once more of the underlying basis of the married women's summary jurisdiction code, and that is, in a sentence, that it is the wife who is the applicant; it is in favour of the wife and of nobody but the wife that whichever of the permitted orders the court decides to make is made. We talk loosely of an order for the children. It is not an order for the children. Although under the Summary Jurisdiction (Married Women) Act, 1895, the custody of the children might be awarded to the wife, there was nothing in the Act about any support for the children. It was not until the Married Women (Maintenance) Act, 1920, that it was provided that, in addition to any of the other orders which might be made for the wife, a sum, then limited to 10s. a week as a maximum, might be ordered to be paid to her in respect of any child of whom she was given the custody. That amount is now 30s., and the wife's maximum amount is £5 instead of £2; but, as I read the amending Acts, no alteration whatever has been made in the fundamental conception that whatever order is made is an order in the wife's favour. A separation order can theoretically be made if any of her complaints is proved (albeit, as has been laid down by the Court of Appeal, justices should not make a separation order, as a matter of discretion, unless it is necessary for the protection of the wife); an order for the custody of the children is an order in favour of the wife. Any sum awarded for the maintenance of the wife, and any sum ordered to be paid to the wife for the support of the children is, as it always has been, an order for the wife; and, speaking generally, any of these orders, as I read the code, can be made and can only be made, if it is established that one of the complaints made by her under the code is found to be proved. In other words, I reject the argument that an order cannot be made in favour of the wife for maintenance of the wife unless it is founded on wilful refusal to provide reasonable maintenance for her, or, put the other way, that if the only legitimate finding is that there has been wilful neglect to provide reasonable maintenance for the infant children whom the husband is legally liable to maintain, no order for maintenance of the wife can be made. I do not think that that is the law. It may be that the amount which justices, or this court, for that matter, may think reasonable in favour of a wife may depend upon whether the neglect has been of the wife or of the children or both, but, in my opinion, the right to make an order is established when once the justices are satisfied that any one of the complaints set out in section 4 of the Act of 1895 is proved.

That principle is somewhat important in this case. The husband has, in fact, sent the wife since the parting £1 a week only, directed specially to the maintenance of the child. The justices have thought it right to quantify the reasonable amount to be paid to the wife in respect of the child as 30s., and it is admitted that the inference from that is that they did not think the amount sent by the husband, even for the maintenance of the child, was a reasonable amount. Therefore, there has been neglect to pay reasonable maintenance in respect of the child whom he was legally liable to support. If so, I should be prepared to hold that the whole order can be supported. If, now that the maximum amount which may be ordered to be paid to a wife is £5, the justices had chosen to say that they would order this wife to receive £3 10s., and had said nothing about splitting it up as between wife and child, in my opinion that order could not have been challenged.

But I do not think we can decide this case solely on that narrow ground, because I think that the reality of the matter is that this is one of the cases in which, usually, but not necessarily so, the question of the right of the wife to support for herself and the question whether or not she has been deserted are really integrally bound up, and I will examine the case from that point of view. It sounds, of course, a perfectly logical argument and one at first sight difficult to answer, that as the justices have found that there is no desertion because the wife was not unwilling that the husband should leave her, it therefore follows that the separation was consensual; and there being no finding that there was any agreement, express or implied, to pay maintenance, therefore, as she cannot establish desertion and has not established that the consensual separation was conditioned by any promise to support her, she cannot recover under any head whatever, even though, as I have already said, it is admitted that it is implicit in the justices' findings that there has been neglect to provide a reasonable amount in respect of the child.

I propose to deal first, on the assumption that this can truly be called a consensual separation (I will examine presently whether there is or is not, on the facts of this case, evidence from which the inference should be drawn that the separation was ever consensual, though assumed to be so for the moment) with the question whether it was upon the footing that the husband expressly or impliedly agreed to maintain his wife. Manifestly, the question must not be approached on the basis that there is some underlying presumption that a husband is liable to support his wife and that an agreement to continue ought necessarily to be inferred. I do not think that that will do. If a wife deliberately chooses to walk out of the matrimonial home even with the tacit consent of her husband, it does not necessarily import that he has agreed to pay for her support out of the matrimonial home. There is abundant authority for that proposition. But that is not this case. This is a case in which a husband, having already left home on an earlier occasion, has begged to be reinstated, and as a condition of reinstatement has agreed to a fixed sum by way of maintenance. I will assume that the agreement was varied, and that he was not in the wrong in the first instance in halving the amount which he had promised to pay, but that at the time immediately preceding the separation there was a de facto agreement to pay £3 at least for the maintenance of himself, his wife and the child. Then he is found to have packed his suitcase before the final quarrel with the deliberate intention of leaving the wife. Then there is a quarrel on January 3, 1953, which resulted in his leaving, thus wilfully bringing to an end as the justices find, the existing state of cohabitation. If words mean anything, (and there is ample evidence to support these findings), there is a clear concurrence of the intention to desert and the fact of separation wilfully brought about by the action of the husband. But the justices go on: "The defendant's action in leaving was not against the will "of the complainant as she had stated she had not wanted him "to return in the first place" (that is, in May, 1952) "but had "given him a chance, and she did not wish him to return now" ("now" meaning at the hearing). It seems to me that even

1953

KINNANE
v.
KINNANE.

Lord Merriman P.

if that is to be taken to mean that she was a party to this separation, the natural implication from the facts is that she consented to it only upon the basis that the maintenance continued. To some extent that is recognised by the husband's own conduct in sending the maintenance of £1 a week, though in my opinion he had no right to limit that to the support of the child, and, if the finding that it was a consensual separation is really correct, I should be prepared to hold that the surrounding circumstances lead to the inference that it was upon the basis that the husband undertook to continue to support the wife and child.

But I do not think that in the real sense of the word this was a consensual separation at all. One does not need to rely on the authority of Buckley L.J. in a passage in a judgment which, in other respects, was not in accordance with that of the majority of the full Court of Appeal in *Harriman* v. *Harriman* [1] for the proposition that " Desertion does not necessarily involve " that the wife desires her husband to remain with her. She " may be thankful that he has gone, but he may nevertheless " have deserted her." For that there is abundant authority, apart from that passage. It is one thing to say that this wife took the husband back reluctantly, and to give him a chance. Nevertheless, they resumed cohabitation and she was willing to continue the cohabitation so long as he supported her and the child, and she had done nothing, as I understand it, and nothing is found against her to the contrary, to depart from that attitude until, having made up his mind to go, the husband took advantage of a quarrel to leave her.

To deal with the thing as a matter of common sense, supposing, at the moment when he announced his intention of walking out of the house, she said " Well, I don't mind your " going. I shall be thankful to see the last of you. But let us " understand what this means. What are you suggesting about " the future? " and the husband said " Please understand that " the moment I am outside the front door I wash my hands of " you altogether. I have no further liability to support you or " the child." It is unnecessary to ask the rhetorical question " What would her answer to that have been? " I decline to hold that she is to be taken to have consented to a parting on those terms: of course she did not: and to say, having brought her charge of desertion, that because she said she did not want her husband back then because of the way he treated her in the past and was likely to treat her in the future, that prevents her from asserting that he has deserted her, is, in my opinion, to fly in the face of authority.

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[1] [1909] P. 123, 148; 25 T.L.R. 291.

I cannot see that there is any evidence of her consenting to a parting on the basis that the husband is entitled to shed his responsibility for her and the child. It is really a corollary of the corresponding question about the wilful neglect, and, in my opinion, the fundamental criticism of the justices' conclusion is that, for a wrong reason, as I think, they have found that the husband's intention to desert, put into effect by the fact of separation, was not desertion because the wife was not unwilling to see the last of him. That decision, in my opinion, was fundamentally wrong, and has given rise to the argument that the finding of wilful neglect to maintain is in conflict with the dismissal of the desertion charge.

The reality of the matter, in my opinion, is that on the facts of this case as found by the justices, the husband intended to desert, gave effect to that intention by the overt act of leaving the matrimonial home and of paying an inadequate amount by way of maintenance afterwards, and that there is nothing in the wife's conduct which disentitles her to charge the husband with desertion and to succeed on that basis as well as on the basis of wilful neglect to maintain. For these reasons, whichever way one looks at it, in my opinion this appeal fails and should be dismissed.

PEARCE J. I agree. The order based on wilful neglect to maintain can be supported on the narrow ground that the justices could on the admitted facts find wilful neglect to maintain the child. This would entitle them to make an order in favour of the wife. Since the order is for 30s. for the child and £2 for the wife, it appears that the justices considered that to be the proper amount of maintenance. It follows that the £1 which the husband paid for the child unaccompanied by any provision for the wife cannot have been adequate maintenance for the child when one considers the added difficulty and expense of maintaining a child when the mother is forced to work to support herself.

The order can also be upheld on the broader ground of failure to maintain both wife and child. Starting from the principle laid down in *Baker* v. *Baker* [2] one has to investigate the particular

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[2] [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81.

1953

KINNANE
v.
KINNANE.

Pearce J.

facts of the case to see whether the circumstances of the separation (if it did not amount to desertion) raised the implication of a continuing liability by the husband to support his wife. When one considers the history of this marriage, and the background and the facts surrounding the parting as my Lord had set them out, I am led quite clearly to the belief that if there was any consensual separation it was on the implied understanding by both parties that the husband's liability to support continued.

But I agree also with what my Lord has said with regard to the issue of desertion. I think that the justices were wrong in drawing the inference that the wife consented to the parting. In my opinion the husband's appeal must be dismissed and the wife's cross appeal on the dismissal of her summons for desertion allowed.

Husband's appeal dismissed.
Wife's cross-appeal allowed.

Solicitors: *Turner & Evans for John Q. Clayton & Co., Luton; Lathom & Co., Luton.*

J. B. G.

1953
July 8.

Barnard J.

WATSON *v.* WATSON.

Husband and Wife—Divorce—Paternity—Estoppel—Decree on ground of adultery—Paternity "not admitted"—Whether res judicata—Legitimacy—Presumption—Use of contraceptives at time of conception—Paternity issue—Practice—Plaintiff—Burden of proof.

An allegation in a husband's petition that he does not admit the paternity of a child does not estop the wife from claiming maintenance for the child after a decree has been granted to the husband on the ground of her adultery, although she did not specifically raise the question of paternity either in an answer to the petition, or during the hearing.

Lindsay v. *Lindsay* [1934] P. 162; 50 T.L.R. 441 distinguished.

The mere use of contraceptives by spouses at the time the wife conceives does not rebut the presumption in favour of legitimacy.

Gordon v. *Gordon and Granville Gordon* [1903] P. 141 applied.

If the paternity of a child is disputed by a husband in an issue, the husband, on whom lies the burden of proof, should be made the plaintiff.

ISSUE as to paternity of child.

The parties were married in December, 1937, and a child, whose parentage the husband did not dispute, was born in July, 1939. Between a disembarkation leave in June, 1945, and March, 1946, the husband spent several week-end leaves with the wife, and on March 5, 1946, he came home after leaving the Forces. The wife gave birth to a child on December 11, 1946, the paternity of which the husband denied in this issue. The parties separated under an agreement between April, 1947, and May, 1948, and after a brief resumption of cohabitation finally separated in June, 1948. In that month the husband learnt for the first time that his wife had committed adultery with a man named Boyd, who told him: "Although she may be "your wife in law she is mine in body and soul." The following day, in the presence of Boyd, the wife said that the child born in December, 1946, was not her husband's. The court was satisfied that Boyd had been a lodger in the matrimonial home for some time before June, 1945.

In 1950 the husband was granted a decree nisi by Barnard J. on the ground of the wife's adultery with Boyd. In his petition, which was filed before the passing of the Law Reform (Miscellaneous Provisions) Act, 1949, he alleged in paragraph 10: "That "on the 11th day of December, 1946, the respondent gave birth "to a child Vivienne Coral, the paternity of which is not "admitted." Shortly after the decree the wife filed a notice of application for maintenance for herself and Vivienne.

The present issue arose out of the claim to the maintenance of the child Vivienne, the husband contending that he was not the father and raising a plea that the matter was res judicata. The husband's evidence (which the court accepted) at the hearing of the issue was that he and the wife used contraceptives: from some date between June, 1945, and March, 1946, rubber sheaths were used instead of pessaries. He said that he was almost certain that he had intercourse with his wife on March 5, 1946, but using a rubber sheath, and that thereafter he had intercourse using a sheath. The relevant evidence is analysed in the judgment.

Prior to the hearing, the wife had refused a request on behalf of the husband for a blood test to be taken of the child.

Van Oss for the husband. Where a husband has disclaimed paternity in divorce proceedings in the manner in which the husband has done in this case, or otherwise, and the wife has

BIBL. LONDIN. UNIV.

taken no steps by way of pleading or at all to counter that assertion before decree, she is estopped from subsequently asserting that the husband is the child's father. [*Lindsay* v. *Lindsay* [1] was referred to.] *Gordon* v. *Gordon and Granville Gordon* [2] is distinguishable from the present case in view of the advances in the knowledge of contraceptives. The evidence establishes that contraceptives were in fact used throughout the relevant period, and this factor, coupled with statements by the wife that the co-respondent was the child's father, are sufficient to rebut the presumption of legitimacy.

Marston Garsia for the wife.

BARNARD J. This is an issue concerning the paternity of a child born to the respondent wife, Mrs. Watson, on December 11, 1946. The only question which I have to decide today is whether or not the petitioner is the father of that child. If, of course, I decide this issue against him, then questions of custody and the maintenance of the child must automatically follow.

The issue arises in this way. On June 15, 1950, which was roughly a month after the husband, Mr. Watson, had obtained a decree nisi, which has since been made absolute, on the ground of the wife's adultery, the wife filed a notice asking the court for maintenance for herself and for this child Vivienne. The husband petitioner then denied the paternity of the child, and the matter now comes before me for decision.

The husband has raised a plea (and it was reserved to me when the issue was ordered to be tried) of res judicata. He says that in his petition, in paragraph 3, he alleged: "That save "as hereinafter appears there is issue of the said marriage now "living one child namely David William born on the tenth day "of July, 1939"; and that in paragraph 10, he alleged: "That "on the 11th day of December, 1946, the respondent gave birth "to a child Vivienne Coral, the paternity of which is not "admitted."

The respondent, in her appearance to that petition, made it clear that she was claiming both alimony and maintenance for herself and for the children; but she put in no answer and, therefore, did not deal with either of those two paragraphs (paras. 3 and 10); but the only issue in the case as between the husband and the wife was whether or not she had committed adultery.

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[1] [1934] P. 162; 50 T.L.R. 441.

[2] [1903] P. 141.

I fail to see how one could possibly say that this is a case of res judicata. There was never any issue before the court whether this child was legitimate or illegitimate; there is no allegation in the petition that the co-respondent is the father of the child. There is not even a definite allegation that the petitioner is not the father of the child himself; he merely says "the paternity of which is not admitted," and the respondent left it at that.

I was referred to *Lindsay* v. *Lindsay*[1] in support of this argument, a decision of Sir Boyd Merriman P. I do not intend to read his judgment because I think that the whole case was so completely different. In that case the child in question was born in 1927, roughly seven years after the marriage. The wife there alleged in her petition that the child was a child of the marriage and asked for its custody. The husband answered that petition and never denied that the child was a child of the marriage, and in due course the wife was granted a decree and given the custody of the child. It was only at a later stage that the husband said: "That is not my child," and Sir Boyd Merriman P. in the course of his judgment said that it was not open to the husband to raise the matter then; he had a chance of saying that this was not a child of the marriage; and he had allowed an order for custody to be made in favour of the wife. I think that the crux of the whole matter is a quotation by the President[2] from a former case in which Lord Merrivale P. said[3]: "An order for custody in a divorce suit—for reasons which I will "presently point out—implies a finding of legitimacy." There is no order for custody yet about this child and the question is at issue. I am quite satisfied that this case does not in any way come within that decision, and the matter certainly is not res judicata.

Although for some reason or other the wife was made the plaintiff in this issue and the husband the defendant, it is perfectly clear that the burden of proof is on him and that he ought to have been made the plaintiff; but I do not think that it really matters whether he is called the plaintiff or the defendant. Counsel for the husband agreed that the burden of proof was on him.

The marriage was in December, 1937, a child was born in July, 1939. The husband was serving in the armed forces during the war and he came home on leave in June, 1945, for

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[1] [1934] P. 162.

[2] Ibid. 170.

[3] *Green* v. *Green* [1929] P. 101, 104; 45 T.L.R. 7.

12 days' disembarkation leave. I am satisfied that, at that time, although the wife denies it, the co-respondent was a lodger in the house and had been a lodger for some time. The husband was a thoroughly honest, straight-forward witness and I see no reason to doubt his evidence, and am satisfied that the substance of it is true. He told me that between June, 1945, and early March, 1946, he spent several week-ends with his wife and then on March 5, 1946, I suppose on demobilisation leave, for a time at any rate, he came permanently home to his wife. The co-respondent was a lodger there the whole time.

The husband did not tell me in the divorce case, because it was not material to the issue and he was not asked about it, that from the very start of the marriage he and his wife used contraceptives. His story comes to this: "We always "used Rendell's pessaries, but when I came home in June, "1945, I brought some rubber sheaths with me; but finding "some Rendell's pessaries still in the drawer we went on using "those." Whether they were completely used up or not I do not know, but there came a time, which I think must have been between June, 1945, and March 5, 1946, when the Rendell's pessaries ceased to be used and the husband invariably used rubber sheaths.

The husband has told me quite frankly that he is almost certain that he had sexual intercourse with his wife on March 5, 1946, but using a rubber sheath, and thereafter that he had sexual intercourse with his wife, using rubber sheaths. On December 11, 1946, the child Vivienne was born. The husband, according to his evidence, said something to his wife about: "Well, we must make the best of it"; but he accepted the child as his, and he does not seem to have been in any doubt merely because he was using these rubber sheaths with his wife. It is, however, fair to the husband to say that he had no suspicion that there was anything going on between his wife and the lodger, Boyd, at that time. It is a material fact that the husband registered this child as his own.

In April, 1947, there was trouble between husband and wife and they separated under an agreement. That separation lasted until May, 1948, when the husband went back to his wife, or she came back to him. They finally separated in June, 1948. He has told me how in June, 1948, he knew for the first time not only that his wife had been committing adultery with Boyd but that he learned, and believed what he was told, that he was not the father of Vivienne. The question arose when Boyd came in and found the husband being quite affectionate to his wife, and evidently feeling annoyed he, Boyd, said something to the effect: " Although she may be your wife in law she is " mine in body and soul." The next day when they were all three together and the wife had Vivienne on her lap, after the co-respondent had said: " Well, if you had come home a " month earlier you would have found your wife pregnant and " she has had a miscarriage by me " (referring, of course, to when he came home for good in March, 1946) the wife, who was nursing Vivienne, added: " Yes, and this child on my lap is " not yours either." That was the first intimation the husband had either as to the wife's adultery or as to the fact that it might not be his child.

I do not propose to say much about the wife's evidence; I am quite satisfied that I cannot rely on anything she tells me; she will say anything to suit her own purposes and she does not seem to mind much whether she is saying it on oath or not. She would have me believe that all that is untrue, that she never committed adultery with Boyd until April, 1947. [His Lordship referred to two letters written to Boyd's wife in December, 1948, in one of which she had said: " . . . as you " must know I have been living with him for five years come " June 6th," and continued:] If the husband were to need any corroboration about the wife saying, when having the child Vivienne on her lap, " This is Boyd's child," there are the statements that the wife made to a Mr. and Mrs. McCalpin, who have nothing to gain by saying anything which is untrue, and who speak as to three separate interviews, when, for some reason or other, the wife said that Vivienne was Boyd's child, and also mentioned the fact that she had been pregnant by Boyd and that there had been a miscarriage prior to the birth of Vivienne.

The fact that I entirely believe the husband and completely disbelieve the wife does not, unfortunately, decide this issue. What I am dealing with here is the legitimacy or illegitimacy of a child, and the law is very strict about these matters.

The law is just the same today as it was at the time of *Gordon* v. *Gordon and Granville Gordon.*[4] It is true that the facts were very different from the facts in the present case, but Sir Francis Jeune P. lays down the law on this particular subject in this way[5]: " The law says that what has to be proved is that the " husband did not have intercourse which might have led to the

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[4] [1903] P. 141.

[5] Ibid. 142.

1953

WATSON
v.
WATSON.

Barnard J.

"birth of the child. It does not allow the fact that another "person had intercourse with the wife to be a material con"sideration." He then refers to some well-known old cases and to a passage in a textbook by Sir Harris Nicolas, and says[6]: ". . . the learned author, after commenting on certain cases, "says this, and it appears to me to represent accurately the law "on the subject . . . ," and the material passage is this: "Sexual "intercourse between man and wife must be presumed, and "*nothing, except evidence* that the husband *did not have such* "*intercourse* at the period of conception, can illegitimise a child "born in wedlock. If the husband could, from circumstances of "time, place, and health, have had nuptial intercourse with his "wife, and there be no evidence to prove that he did not have "such intercourse, he must be considered the father of her child, "even if she had committed adultery with one, two, or twenty "other men."

It is quite true that since 1903 the use and knowledge of contraceptives has become much more common, and although I am quite satisfied that the husband has told me the truth and that he was using contraceptives, I do not feel that the mere use of contraceptives in any way alters that proposition of law. The husband himself, knowing that he was using contraceptives, did not at the time doubt that he was the father of the child and that the contraceptives might have let him down, and it is part of his case that contraceptives of another nature, Rendell's pessaries, let him down when the first child was born, about whom there is no dispute. Although I am satisfied that the wife for some reason or other made all those statements against her own interests that Boyd was the father of her child, I do not think that such statements, more especially coming from the woman I know her to be, a woman utterly regardless of the truth, who would say anything to suit her own purpose, whatever that might be at the moment, are sufficient to rebut the presumption of law in favour of legitimacy.

It is to be noted that although the wife wrote letters to Mrs. Boyd, bitter letters, bitter against Mrs. Boyd's husband, and obviously anxious to harm him with Mrs. Boyd, there is no reference in those letters, which were written in December, 1948, to Boyd being the father of the child born in December, 1946; and I have come to the conclusion, although I am satisfied that the wife had been committing adultery with Boyd from about

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[6] [1903] P. 143.

June, 1944, and although he was a lodger in the house and probably committing adultery with her quite shortly before the husband returned, the husband at the critical time when this child might have been conceived was having sexual intercourse with his wife. He was having sexual intercourse with her it is true, as he says, with rubber sheaths, but, none the less, I think the presumption of law must prevail.

The only other matter I think I ought to mention is the question of a blood test, but once again I do not think that that carries one any further; it ought not to count against the child and it is the child's future I am considering—it only shows what a thoroughly evasive woman the wife is.

Having heard all the evidence I have come to the conclusion that if I had to decide this merely on a balance of probability I would decide in the husband's favour because he is obviously so truthful, coupled with the wife's statements about the paternity of the child; but in face of the presumption of law which means that he must satisfy me beyond all reasonable doubt, I feel that he has not displaced the presumption. I therefore decide the issue in favour of the wife.

Solicitors: *Gregory, Rowcliffe & Co. for Wood, McLellan & Williams, Chatham; F. N. W. Lockyer, the Law Society Divorce Department.*

J. B. G.

KING *v.* KING.

C. A.

1953
July 30;
Oct. 12.

Singleton, Denning and Morris L.JJ.

Husband and Wife—Maintenance—High Court—Jurisdiction—Parties judicially separated—Wife's application for secured maintenance —Meaning of "jurisdiction" in Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23.

By section 23 of the Matrimonial Causes Act, 1950: "(1) Where "a husband has been guilty of wilful neglect to provide reasonable "maintenance for his wife . . . , the court, if it would have jurisdic-"tion to entertain proceedings by the wife for judicial separation, "may, on the application of the wife, order the husband to make "to her such periodical payments as may be just; . . ."

A wife who had obtained a decree of judicial separation from her husband later applied to the court for an order for secured maintenance under section 23 of the Matrimonial Causes Act, in preference to applying for alimony under section 20 (2) of that Act. On the husband's preliminary objection that the words defining the scope of the court's jurisdiction under the section

1953

KING *v.* KING.

necessarily excluded an application by a wife who was already judicially separated:—

Held, that the word "jurisdiction" in section 23 was used in a sense special to the Divorce Division, and meant that where the parties to a marriage had the requisite domiciliary or residential qualifications to enable a court to entertain proceedings for judicial separation, the court had jurisdiction to entertain applications under section 23 by the wife of such a marriage; and that as those qualifications were here satisfied, the court had jurisdiction to entertain this wife's application.

Decision of Davies J. [1953] 3 W.L.R. 433; [1953] 2 All E.R. 595 affirmed.

Woodward v. *Woodward* [1952] P. 299; [1952] 2 T.L.R. 37; [1952] 2 All E.R. 226 and dictum of Lord Merriman P. in *Cooper* v. *Cooper* [1953] P. 26, 34; [1952] 2 T.L.R. 957; [1952] 2 All E.R. 857 approved.

INTERLOCUTORY APPEAL from Davies J.[1]

On July 31, 1952, the House of Lords dismissed the appeal of Godfrey Howard King, a husband petitioner (*King* v. *King* [2]), from a decision of the Court of Appeal reversing a decision of Barnard J. who had pronounced a decree nisi in favour of the husband on the ground of the wife's alleged cruelty, the judge exercising his discretion in respect of the husband's admitted adultery.

On September 3, 1952, the wife, Elizabeth Rosa King, a Roman Catholic, petitioned for a judicial separation on the ground of the husband's adultery. The petition was undefended, and a decree of judicial separation was pronounced on January 28, 1953. The wife made no application for permanent alimony at the time; but on May 7, 1953, she took out an originating summons under section 23 of the Matrimonial Causes Act, 1950,[3] alleging that her husband had been guilty of wilful neglect to provide reasonable maintenance for her, her admitted purpose being to obtain secured provision under section 23 (2) of the Act of 1950.

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[1] [1953] 3 W.L.R. 433; [1953] 2 All E.R. 595.

[2] [1953] A.C. 124; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584.

[3] Matrimonial Causes Act, 1950, s. 20: "(2) On any decree for judicial "separation, the court may make "such order for the payment of ali-"mony to the wife as the court thinks "just."

S. 23: "(1) Where a husband has "been guilty of wilful neglect to pro-"vide reasonable maintenance for "his wife or the infant children of "the marriage, the court, if it would "have jurisdiction to entertain pro-"ceedings by the wife for judicial "separation, may, on the application "of the wife, order the husband to "make to her such periodical pay-"ments as may be just; and the "order may be enforced in the same "manner as an order for alimony in "proceedings for judicial separation.

"(2) Where the court makes an "order under this section for periodi-"cal payments it may, if it thinks fit, "order that the husband shall, to the "satisfaction of the court, secure to "the wife the periodical payments, "and for that purpose may direct "that a proper deed or instrument to "be executed by all necessary parties "shall be settled and approved by one "of the conveyancing counsel of the "court."

The husband at first entered a general appearance to that summons, but on June 5 he applied for leave to amend by adding the words "under protest," disputing that the court had jurisdiction to entertain the application, and for directions as to the determination of the question arising by reason of such an appearance. This summons was adjourned by the registrar to the judge, and was heard in chambers on June 24, 1953, when it was adjourned into open court for judgment.

D. A. Fairweather for the wife.

Colin Duncan and *H. R. la T. Corrie* for the husband.

Cur. adv. vult.

July 5. DAVIES J., reading his judgment, stated the facts and continued: At the hearing [in chambers] counsel on each side asked me (a) to decide the point of law which the husband's summons was designed to raise, and (b) to adjourn the summons into open court before giving my decision thereon, to which requests I agreed.

The argument of Mr. Duncan, for the husband, is essentially a short and simple one, and is based entirely on the words of section 23 (1) of the Act. [His Lordship read the section.] The important words for the purpose of the point which has to be decided are, "if it would have jurisdiction to entertain proceedings by the wife for judicial separation." The contention for the husband is that it is a condition precedent to the exercise of the jurisdiction given by this section that the court should at the date of the wife's application have jurisdiction to entertain proceedings by the wife for a judicial separation, and that in the present case, as the wife has already obtained such a decree, which remains in full force and effect, the court would have and has no such jurisdiction. It is impossible, it is said, for a court to pronounce a decree of judicial separation between parties who are already judicially separated, and this is an objection which would go not merely to the merits of any such petition by the wife but to jurisdiction. To construe the section in any other way would, it is said, be in effect to read into the section the word "had" between the words "have" and "jurisdiction."

Mr. Fairweather, on the other hand, contends that the words on which the husband's argument is based do no more than define the ambit of the application of the section. If it were not for their presence there might well be a doubt whether the jurisdiction depended on domicile, on residence, or on mere presence in this country. The effect of these words, it is said, is merely to provide that a wife may apply to the court under the section if the residence or domicile of the parties is such that the wife could petition for a decree of judicial separation. The mere fact that there is already in existence a decree of judicial separation would not prevent the court from entertaining another suit for the same relief, though it would no doubt prevent the court from granting a decree. It is also suggested that the legislature when enacting section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, which was, of course, the precursor of section 23 of the Matrimonial Causes Act, 1950, must have intended to give an adequate remedy and to include the right to ask for a secured provision to wives who are unwilling either to divorce their husbands or to adopt the often insincere device of a petition for restitution of conjugal rights, and that it could not have been intended that a wife who has obtained a decree of judicial separation should be able to apply to a court of summary jurisdiction, whose powers are limited in amount, for an order on the ground of wilful neglect to maintain—as she undoubtedly can (*Cooper* v. *Cooper*[4])—but should in precisely similar circumstances be prevented from applying to this court where there is no financial limit.

I confess that I do not find that last argument particularly convincing. The intention of the legislature is a matter upon which it is frequently dangerous to speculate. And as Mr. Duncan pointed out, it is equally possible that the legislature, when creating the High Court jurisdiction in such cases, may have deliberately intended not to empower the court to order security and to give merely a power similar to that of courts of summary jurisdiction to order payments to be made. Moreover, it is plain that the present problem could not arise in connexion with the exercise of the powers of a court of summary jurisdiction; for the relevant words of the Summary Jurisdiction (Married Women) Act, 1895, s. 4, are: "Any married woman . . . whose "husband shall have been guilty of . . . wilful neglect to provide "reasonable maintenance for her . . . may apply . . . ."

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[4] [1953] P. 26; [1952] 2 T.L.R. 957; [1952] 2 All E.R. 857.

In the course of the argument three authorities were cited. The first was *Rusby* v. *Rusby*,[5] where Lord Merriman P. said: "Before the court entertains an application of this sort,"—that, of course, is under section 23—"it is first of all necessary for "it to satisfy itself that it would have jurisdiction to entertain "proceedings by the wife for judicial separation. Mr. Sutcliffe "has rightly refrained, in my opinion, from suggesting that that "means that one has to inquire whether the circumstances are "such that a decree of judicial separation should be pronounced. "What is meant is that the status of the parties as regards "domicile, residence or the like is such that the court would have "jurisdiction as between those parties to pronounce a decree of "judicial separation. If that condition is satisfied, then it has "jurisdiction to entertain an application of this kind."

That decision was followed by Willmer J. in *Woodward* v. *Woodward*.[6] In that case a respondent to a summons under section 23 took the preliminary point that as the wife alleged that the respondent had deserted her for a period of less than three years the court would not have jurisdiction to entertain proceedings for judicial separation based on such desertion and that, therefore, the court had no jurisdiction to entertain the application under section 23. Willmer J. decided against the husband's contention and said[7]: "In my judgment, the argument,"—that is to say, the argument of Mr. Comyn for the husband—"attrac- "tive as it is, is entirely fallacious because it confuses the "question whether there is jurisdiction to entertain proceedings "with the question whether there are in fact good grounds for "proceedings. Merely because the wife would necessarily have "failed in a particular case had she instituted proceedings for "judicial separation, it does not in the least follow that the "court would have no jurisdiction to entertain such proceedings. "The jurisdiction to entertain proceedings depends on the "domicile and residence of the parties. That is quite a separate "matter from the merits of the claim put forward. It seems "to me that any other view would involve that this new section "of the Act added nothing to the remedies already open to the "wife. Yet, quite clearly, I should have thought, section 23 "was intended to confer a new remedy."

Finally, I was referred to an observation made by Lord Merriman P. in the course of his judgment in the Divisional

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[5] [1950] W.N. 349.

[6] [1952] P. 299; [1952] 2 T.L.R. 37; [1952] 2 All E.R. 226.

[7] [1952] P. 299, 300–1.

Court in *Cooper* v. *Cooper*.[8] The actual point decided in that case was, as I have already indicated, that a wife who has obtained a decree of judicial separation is entitled to apply to a court of summary jurisdiction for an order on the ground of wilful neglect to maintain. But in the course of his judgment Lord Merriman P. said[9] that, "apart altogether from any pro-"ceedings which she"—that is to say, the wife, "could, or could "not, take for alimony in the suit for judicial separation, she has "under what is now section 23 of the Matrimonial Causes Act, "1950, the right to sue in the High Court for wilful neglect to "provide reasonable maintenance." It is true that that observation of the President was obiter and that this particular point was not argued. But I am sure that the observation was not made without due consideration, and it is obvious that any dictum of the President upon a matter of this sort is one to which great weight must be given. Of course, if the President's view is right, it is conclusive of the present case.

After having had the benefit of a full argument, I confess that I do not find the point altogether easy, and I cannot help feeling that the wording of the statute might with advantage have been clearer; but on the whole I have come to the conclusion that the present case is covered by the decision of Willmer J. in *Woodward* v. *Woodward*,[10] and that the contention of the wife is correct. As it seems to me, there is no essential difference on this issue between a wife who petitions for judicial separation on a ground which in law does not entitle her to such a decree, as was notionally the case in *Woodward* v. *Woodward*,[10] and a wife who petitions for judicial separation when by reason of the existence of a previous decree she cannot hope in the event to be successful. If the objection in the former case is one which goes only to the merits and not to jurisdiction, as Willmer J. held, so, in my judgment, must be the objection in the latter case. In both cases, as it seems to me, the court can entertain the petition, though in neither case would a decree be pronounced. In my opinion, therefore, the husband's preliminary objection fails, and this wife is entitled to proceed with her application under section 23. Needless to say, I am fortified in the conclusion at which I have arrived by the observation made by Lord Merriman P. in *Cooper* v. *Cooper*,[11] to which I have already referred.

There is, in my opinion, one other consideration which supports this conclusion. It is, as I understand it, conceded on behalf of the husband that where the parties are, for example, resident within the jurisdiction, the wife would have a right to apply, and might succeed in obtaining an order, under section 23, even though on the facts and the merits she would have no hope of obtaining a decree of judicial separation. If that is so, it would indeed be remarkable if a wife who has on the merits established her right to such a decree, is to be shut out from the remedy given by the section.

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[8] [1953] P. 26.

[9] Ibid. 34.

[10] [1952] P. 299.

[11] [1953] P. 26, 34.

In the result the husband's summons will be dismissed with costs. This is plainly a matter of some difficulty which the husband, if he is minded so to do, is entitled to take further, and I will, therefore, give leave to appeal.

The husband appealed.

Colin Duncan for the husband. Section 23 of the Act of 1950 contained a new provision under which a wife could apply for secured maintenance if the court had jurisdiction. This wife could have obtained an unsecured order for alimony under section 20 (2). It is a condition precedent to the exercise of the jurisdiction under section 23, however, that at the date of the wife's application the court should have jurisdiction to entertain a suit for judicial separation. "Entertain" in this connexion means "adjudicate on" in the substantive sense. This wife is debarred from taking advantage of the section because she has already obtained a decree for judicial separation. The question is one of construction of the words "if it would have jurisdiction to enter-"tain proceedings by the wife for judicial separation." Davies J. said that the words meant only jurisdiction by reason of domicile, residence, and the like. He relied on *Woodward* v. *Woodward* [12]; but in that case Willmer J. was bound to pronounce against the petitioner and to decide that on the evidence the court, which had no jurisdiction to entertain her petition, was bound to dismiss it.

[DENNING L.J. It is an anomalous position if it is possible to obtain secured provision on a decree for restitution or divorce and not on a judicial separation.]

There are anomalies throughout the history of divorce legislation, and this would merely perpetuate the unbroken law in relation to judicial separation. It is conceded that the dictum of Lord Merriman P. in *Cooper* v. *Cooper* [13] that a wife has a right to ignore section 20 (2) and to sue in the High Court under section 23 at any time after she has obtained a decree of judicial separation would be conclusive against this husband if it were part of the President's decision, but it was obiter and the point on construction was never argued.[14]

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[12] [1952] P. 299.

[13] [1953] P. 26.

[Singleton L.J. If the legislature meant to give additional rights by section 23, why did they not strike out section 20 (2)?]

The Act of 1950 was a consolidating Act and not an amending Act.

D. A. Fairweather for the wife. The words under consideration are words of limitation, and not words of choice; they do not give the wife an alternative remedy, i.e., either this application or a judicial separation, but they limit the number of persons who can apply for this remedy. Until 1949, Roman Catholic wives who would not take divorce proceedings had to submit quietly while their husbands disposed of capital assets which the court might have tied up for the wife if she had taken divorce proceedings. In 1949, by section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949—the precursor to section 23 of the Act of 1950—the legislature remedied that defect. Rights are given in that Act, both under sections 20 and 23, exactly analogous to the position under the old law, the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 186, 187 and 190 (4).

[Denning L.J. In divorce matters, "jurisdiction to entertain" is generally used to connote matters such as domicile, residence, and so on.]

Yes; it derives from the fact that this was in origin an ecclesiastical jurisdiction based on the bishop's diocese. Davies J. was correct when he said that it would be remarkable if a woman with small merit could obtain the relief provided by section 23, while a woman with merit could not.[15] If a wife who already has a decree of judicial separation is to be shut out, words must be read into section 23 such as "if she has not already obtained "one," for on their simple meaning the words do no more than limit the ambit of jurisdiction to any married woman who can bring herself within the provisions applying to judicial separation. All the decided cases, including the dictum of Lord Merriman P. in *Cooper* v. *Cooper*,[16] are in favour of the submission for the wife. If the reverse is correct, the scope and efficiency of section 23 will be seriously limited.

Duncan in reply. Denning L.J. has pointed out that there is

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[14] [1953] P. 26, 34.

[15] [1953] 3 W.L.R. 433, 438.

[16] [1953] P. 26, 34.

C. A.
1953
King
v.
King.

a special use of the term "jurisdiction" in the Divorce Division. But where "jurisdiction" stands alone, as here, it is submitted that it has its ordinary meaning, so that the court cannot entertain proceedings for judicial separation by a person who is already judicially separated.

Cur. adv. vult.

Oct. 12. Singleton L.J. said that he would ask Denning L.J. to give the first judgment.

Denning L.J. On January 28, 1953, the wife obtained a decree of judicial separation. On May 7, 1953, she took out a summons against her husband in the High Court under section 23 of the Matrimonial Causes Act, 1950. In that summons she alleged that he had wilfully neglected to provide reasonable maintenance for her: and she asked for an order on him to make periodical payments for her maintenance, and for an order to secure such payments. The question is whether a wife who has obtained a decree of judicial separation can avail herself of section 23. The husband contends that she has no right to apply under section 23, and that her only right is to apply for alimony under section 20 (2) of the Act. This would look at first sight to be a somewhat barren dispute. It would not seem to matter under which section she applies so long as an order is made for payments to her. But the difference is this: under section 23 the court can order the husband to secure the payments by a deed of covenant, depositing some of his property as security and covering her, not only during their joint lives, but also during widowhood: whereas under section 20 the court has no power to order any such security to be provided for her.

The origin of section 23 is well known. Before 1949, the only way in which a wife (who did not seek a divorce or separation) could get maintenance from her husband in the High Court was to bring a suit for restitution of conjugal rights. If he disobeyed the order, the court would order him to make periodical payments for her support. This procedure was expensive and cumbersome, and, moreover, the wife had to assert on oath that she wanted her husband back, which was often the last thing she wanted. There was, however, a remedy to be had from the magistrates. Ever since 1895, a wife has been able to apply to the magistrates for maintenance; but this was only suited to people of small means because the magistrates could award her at most £2 a week. In 1949, therefore, a new

C. A.
1953

KING
v.
KING.

Denning L.J.

procedure was introduced, whereby a wife could apply direct to the High Court for maintenance instead of having to bring a suit for restitution. This procedure was originally enacted in 1949 by section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, which has now been replaced by section 23 of the Act of 1950.

In introducing this new procedure, the legislature put the wife into as good a position as if she had brought a restitution suit. The High Court was given jurisdiction, not only to order periodical payments but also to order the husband to give security for them. It must be remembered that before 1884 the court had no power in a restitution suit to order a husband to make payments or give security. It had power to commit him to prison if he did not obey the decree, but that was all. In 1884, however, the power to commit to prison was taken away, and instead of it the court was given jurisdiction to order the husband to make periodical payments and also to give security. In 1949 this jurisdiction was extended to the new maintenance suit.

Alongside all these developments, however, there has always been available to a wife, who did not want a divorce, the procedure for judicial separation. If she could prove one of the recognized grounds, such as cruelty or adultery, she could obtain a decree of judicial separation, and thereupon the court could order the husband to pay her permanent alimony; but it could not order him to give security for the payments. This has been the law from 1857 onwards, and it finds its place now in section 20 (2) of the Act of 1950.

The question in this case is: what is the position of a wife who has obtained a decree of judicial separation and seeks payments for her support? Is she confined to the old procedure set forth in section 20 (2), or can she apply under the new procedure laid down in section 23? On this question, the critical words are those in section 23, which says that the powers under that section are only available to the court on this one condition: "if it would have jurisdiction to entertain proceedings "by the wife for judicial separation." At first sight it would appear from these words that section 23 is dealing with cases where the wife has not proceeded for judicial separation, but could have done so had she wished.

I must say that I think that the words are most unhappily chosen. Take a case where a wife is deserted by her husband and left penniless. She cannot bring proceedings for divorce or judicial separation until the desertion has lasted for three years. The court has in one sense no jurisdiction to entertain proceedings by her for judicial separation until three years have elapsed. But surely she is entitled meanwhile to bring proceedings for maintenance under section 23. If she could not do so, one of the main objects of the legislature would be defeated.

This leads me to the conclusion that the word " jurisdiction " in section 23 is not used in its ordinary sense. It is used in a special sense peculiar to the Divorce Court. The practitioners in that court use the word " jurisdiction " to denote the personal qualifications of domicile or residence which are required of the parties before the court will adjudicate between them. Thus it is said that in suits for divorce, jurisdiction depends on domicile. In suits for judicial separation, it depends on domicile or on residence. In restitution suits, it depends on domicile or residence or the matrimonial home. In nullity suits, it is not easy to say on what it does depend. When this terminology is borne in mind, it becomes fairly plain what was the object of the legislature in inserting this condition in section 23. It was introducing into the Divorce Court a suit, of a kind unknown before, in the shape of a maintenance suit, and it was felt desirable to specify the qualifications of domicile or residence which should be fulfilled to enable the court to entertain the suit. Out of the mixed bag available, the new maintenance suit was put on the same basis as a suit for judicial separation.

In these circumstances I feel that we ought to give the word " jurisdiction " in section 23 the special connotation of the Divorce Court. The condition " if it would have jurisdiction " only means that the parties must have such qualification of domicile or residence as would enable the court to entertain a suit by the wife for judicial separation. It has nothing to do with the validity or merits of a claim for judicial separation. The liability of the husband does not depend on desertion or cruelty or adultery (as it would in a suit for judicial separation) but simply on his wilful neglect to provide reasonable maintenance for his wife. Willmer J. has so held in *Woodward* v. *Woodward*,[1] and I find myself in entire agreement with him.

Applying this test, it is clear that the parties in this case have all the personal qualifications necessary to enable the court to consider a claim for judicial separation. They are both domiciled in this country and also resident here. That is sufficient to satisfy the condition in section 23. It is true that, if a claim for judicial separation were made, it would be bound to fail, because the wife has already obtained a decree for judicial separation, and the court would not permit a second decree for the same cause, there being no change of circumstances since the first decree. But that does not defeat the claim under section 23, because the test is not whether the court would grant a decree for judicial separation, but whether the parties have the requisite domiciliary or residential qualifications, which they clearly have.

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[1] [1952] P. 299; [1952] 2 T.L.R. 37; [1952] 2 All E.R. 226.

Once this point is decided in favour of the wife, there seems no reason why she should not have the right to proceed under section 20 (2) or section 23 at her choice. If there are advantages under section 23 which are not available under section 20, she is entitled to seek them. Lord Merriman P. has so said in *Cooper* v. *Cooper*,[2] and I think that we should follow his guidance upon it. I find myself in agreement with Davies J. and I would dismiss this appeal.

MORRIS L.J. I have had the opportunity of considering the judgment which has just been delivered, and I am in agreement with it.

SINGLETON L.J. I agree that the appeal should be dismissed. The wording of section 23 (1) of the Matrimonial Causes Act, 1950, gives rise to some difficulty, but after full consideration I feel that the judgment of Davies J. is right; it is in accordance with common sense and with justice.

Appeal dismissed.

Solicitors: *Bird & Bird; Scadding & Bodkin.*

M. M. H.

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[2] [1953] P. 26, 34; [1952] 2 T.L.R. 957; [1952] 2 All E.R. 857.

FOSTER *v.* FOSTER.

1953
June 8.

Lord Merriman P. and Collingwood J.

Husband and Wife—Divorce—Desertion—Dismissal of previous charge of cruelty upon similar facts.

A wife's summons dated August 29, 1952, by which she alleged persistent cruelty on August 16, 1952, and on divers days prior thereto, was dismissed by certain justices on September 17, 1952, some two weeks after she had left the matrimonial home. The nature of the cruelty alleged was a charge of maltreatment consisting of physical violence over many years, coupled with allegations of association with other women throughout that period, and in particular with a named woman in the latter part of it. On November 6, 1952, she was granted an order in another petty sessional division on the ground of constructive desertion from September 4, 1952, the day she left home, and wilful neglect to maintain. Her allegations in the second court as to most of the conduct which was held to have caused her to leave the matrimonial home had been rejected by the first court as insufficient to establish persistent cruelty. There was, however, evidence before the second court that the wife had left home because her husband had said that he had finished with her; that he would not turn her out, but would go out more himself. She also referred to a further assault on August 28, 1952:—

Held, (1) that the wife was not bound to put the charge of desertion before the first court under penalty of being estopped from afterwards alleging that she had been deserted before the date of the hearing by that court;

(2) that although the husband's conduct had been found not to amount to cruelty, it could not be said, in view of his attitude towards his wife, that there was no evidence to support a charge of desertion in the second court.

Pike v. *Pike*, post, p. 81n.; [1953] 1 All E.R. 232 distinguished; *Edwards* v. *Edwards* [1950] P. 8; 65 T.L.R. 419; [1949] 2 All E.R. 145; *Barker* v. *Barker* [1949] P. 219; 65 T.L.R. 49; [1949] 1 All E.R. 247 considered.

Appeal from an order of November 6, 1952, by the justices for the petty sessional division of Sutton, Surrey, on the grounds of desertion and wilful neglect to maintain.

By a summons dated August 29, 1952, the wife complained that on August 16, 1952, and "on divers days prior thereto," the husband, whom she had married in 1927, had been guilty of persistent cruelty. On September 4, 1952, she left the matrimonial home. On September 17, 1952, a court of summary jurisdiction sitting at Dorking, Surrey, dismissed the summons; and by a second summons, dated October 24, 1952, the wife complained that her husband had been guilty of (constructive) desertion since September 4, 1952, and had wilfully neglected to provide her with reasonable maintenance. It was common ground that the wife had left the home on September 4, 1952, and that the husband had not maintained her between then and the date of the hearing of November 6, 1952, when the order appealed against was made. Although neither the notes of the evidence at Dorking, nor the reasons for the decision of that court, were formally put in and proved before the Sutton justices, there was frequent reference before them to the earlier proceedings. The Sutton justices accepted the wife's evidence as true and held that the husband had caused her to leave the matrimonial home, and made an order accordingly.

The wife's charge of cruelty before the Dorking justices was one of maltreatment by the husband consisting of violence over the preceding years, coupled with allegations of associations with other women throughout that period, and in particular with a Mrs. D. The wife gave evidence at Dorking of an assault on August 16, 1952, which caused injury to her lip, as the culmination of the course of ill-treatment on which she relied. The incident was said to have arisen out of an expedition by the husband with Mrs. D. and others to Brighton. She also gave evidence at Sutton of a similar incident stated to have occurred on August 28, 1952 (the day before the issue of the cruelty summons), when her husband, she said, had hit her on the mouth after a quarrel arising out of an expedition with Mrs. D. and others to Redhill. Although no evidence was led at Dorking concerning anything which was alleged to have occurred after August 16, 1952, the latest date to which reference was made on the cruelty summons, the wife gave evidence in general terms that matters had come to a head at the end of August, 1952, and that she had left home on September 4, 1952; while the husband in cross-examination referred to a scene on a day identifiable with August 28, 1952.

Immediately after the dismissal of the cruelty summons on September 17, 1952, the parties had an interview with the probation officer at the Dorking court concerning which evidence was given by both sides at Sutton; the wife said in evidence that she had told the probation officer that "she could not possibly "go back to her husband because of his cruelty," but indicated that she might think the matter over. The wife, in her evidence at Sutton, also said: "On September 4 I left home because he "[my husband] said that he had finished with me. He would "not turn me out, but he would go out more himself."

The following more detailed summary of the facts is taken from the judgment of Collingwood J.: The wife said at Dorking that the marriage had started to break up at the beginning of the war. The husband worked at a pistol rocket factory near their home, which brought him into contact with a number of girls who were working at the same factory, and he stayed out late at night. She said that she was suspicious of his association with them because he appeared to prefer their company to hers and neglected to take her out, and that when she challenged him with this it led to quarrels, and that these quarrels as often as not ended in his hitting her in the face. She added when she was before the Sutton justices, with regard to his failure to take her out, that when he was taking the girls out he told her "I would not take a thing like you out," and she said that if she asked him to do so he flew into a rage and hit her with the flat of his hand in the face. Apart from his partiality for girls in general during the last two years or so, the wife spoke of his association with a Mrs. D., in particular during the last six months. She said at Sutton that if she asked him not to go out with Mrs. D., as she frequently did, he hit her. At Dorking she said that during these quarrels he indulged in threats to the effect that he would "do her in" before he had finished with her, and that this phrase had recently become more frequent and had worried and frightened her. She referred at Sutton to an express threat a week before she left to "do her in." She also said at Sutton that in addition to such conduct her husband, when he could not "get what he wanted" (she was referring to sexual intercourse) would hit her, and would say that he would go out, because he knew "where he could get it." She said that matters came to a head at the end of August, 1952: the husband had been seeing more and more of Mrs. D., her protests as before had been met by a smack in the face, and she added in her evidence: "If I asked him not to go out with "Mrs. D. or to stay in he would hit me," and, "He hit me once "a week before I left," and, "Once he sent me across the sink," implying a smack which made her fall.

The incident of August 16, 1952, was dealt with by the Dorking justices as being the culminating incident in the list of acts which were alleged to constitute cruelty. On that date the husband went to Brighton with Mrs. D. and Mrs. D.'s husband and son, returning late in the evening. That led to an argument, and the argument led to another smack in the face, which on that occasion made her lip bleed. She added nothing to that incident in her evidence given at Sutton, except that she said that he had refused to take her to Brighton although she had wanted to go. She gave no specific evidence before the Dorking justices concerning the incident of August 28, 1952, but the evidence of the husband in the course of his cross-examination there made it apparent that there was an incident on that day.

At the hearing on November 6, 1952, before the Sutton justices, the wife dealt in some detail with the incident of August 28, 1952. It arose, she said, out of a visit to Redhill by the husband, who had assured her that Mrs. D. was going to work that day. However, she saw Mrs. D. waiting at Beare Green and spoke to her, the conversation being passed on later to the husband and described as being insulting. The wife went on to say in her evidence: " At tea-time he came back. " He got up "—presumably meaning from a chair—" and asked " me what I had said to Mrs. D. I said that I had told her " she was to be at work "—meaning that she (the wife) had understood that Mrs. D. should be at work. Thereupon, according to the wife's evidence, her husband hit her in the mouth and made a mark upon her lip. In her evidence she said: " I called someone. He [my husband] pushed me into a chair. " I screamed. I went to a neighbour. I was frightened of " him and afraid to go to bed. He said he would ' do me in.' " Asked when that threat to " do her in " had been made, she said that it was a week before she left the matrimonial home.

That evidence was before both the Sutton and the Dorking justices, evidence, so far as the Dorking justices were concerned, upon the issue of cruelty.

The Sutton justices in the brief statement of their reasons said that they found as a fact that the wife's evidence was true, and that " the husband's conduct caused her to leave the matrimonial " home and he deserted her, and further, he has wilfully neglected " to maintain her." The reasons given by the Dorking justices for their dismissal of the cruelty summons were summarized by Lord Merriman P. as follows: They found that over the past ten years the wife had been obsessed with the idea that the husband was having affairs with other women, originally with women who had been work-mates at a factory during the war, and that during the last year or so the wife particularly accused the husband of having an affair with Mrs. D.; but they accepted the evidence of the husband that he was friendly with that family, and found that there was no evidence that he was guilty of any improper association with Mrs. D. As regards

1953

FOSTER
v.
FOSTER.

the wife's complaint that he was always frequenting that family's house and neglecting her, they found in his favour that it was the wife who refused to go out with him to parties at that house. As regards the physical violence, they found that the husband had smacked his wife from time to time when she had been nagging him about going out without her, but that such acts or the defendant's conduct were not of such a character as to have caused danger to life, limb or health, bodily or mental, or so as to have given rise to a reasonable apprehension of such danger. Having seen and heard both parties in the witness-box the justices stated that they were more impressed by the husband than by the wife, who appeared to them to be a very jealous, possessive and nagging type of woman. "The complaint was "therefore dismissed, as it was not considered that there was "sufficient evidence of persistent cruelty to justify an order being "made."

D. E. Peck and *J. Mason* for the appellant husband. The wife was estopped per rem judicatam from making the charge of desertion at the Sutton court. That was a matter which, if she were going to allege it at all, she should have alleged at Dorking. The evidence given by her at Dorking in support of her charge of persistent cruelty was substantially the same as that which she later gave at Sutton in support of her charge of desertion. Nothing had occurred since the hearing at Dorking which enabled her to re-open the matter. Moreover, even if the wife were not estopped, the court ought to have dismissed her complaint of desertion since the conduct of which she complained had already been held not to amount to cruelty and could not therefore form the basis of a charge of constructive desertion. [Reference was made to *Pike* v. *Pike*[1] and *Barker* v. *Barker*.[2]]

P. Boydell for the respondent wife. There was no estoppel because the complaint at Sutton was of a different nature. No evidence had been given at Dorking of anything which happened after August 16, 1952, and such evidence would have been inadmissible unless there had first been an amendment to the summons. Not only was the complaint different, but the evidence which supported it was different both as to the period covered by it and as to its quality. There had also been dealings with the probation officer since the hearing at Dorking and that was a

[1] Post, p. 81.

[2] [1949] P. 219; 65 T.L.R. 49; [1949] 1 All E.R. 247.

matter which it was proper for the justices to consider. [*Timmins* v. *Timmins*[3] and *Dixon* v. *Dixon*[4] were referred to.]

LORD MERRIMAN P. This is a husband's appeal from an order made against him on November 6, 1952, by the justices for the petty sessional division of Sutton, in Surrey, on the ground of desertion and of wilful neglect to provide reasonable maintenance for his wife. I am bound to say at the outset that it is a case of some difficulty, about which I feel that it is impossible to arrive at a conclusion either way which will be wholly satisfactory to myself or likely to be so to the parties. So far as this particular order is concerned, the matter begins with a summons of October 24, 1952, based on a complaint by the wife of desertion as from September 4, 1952, and of wilful neglect to provide reasonable maintenance for her. No date is specified with the latter charge, but it has been taken as being intended to cover the period from the desertion to the date of the summons. It is common ground that on September 4, 1952, the wife left the matrimonial home, and that the husband had not maintained her between that date and the date of the hearing. In the statement of the reasons for their decision the justices said that they found as a fact that the wife's evidence was true "and that [the "husband's] conduct caused her to leave the matrimonial home "and he deserted her, and further, he has wilfully neglected to "maintain her." It would have been more helpful if the justices had amplified their finding and stated with a good deal more particularity what was the conduct on which they relied.

I wish to say at once that this is admittedly a case in which the charge of wilful neglect to provide reasonable maintenance stands or falls with the charge of desertion, because it is conceded that, unless the wife can justify her withdrawal from cohabitation, she would, in the circumstances, have no claim to maintenance.

Taking the note of the evidence provided by the clerk to the justices in isolation, it would not be easy to establish the proposition that there was no evidence to support the finding; but the crux of this case is that that evidence does not stand alone. On the contrary, the wife's allegations as to most, if not all, of the conduct which presumably has been held to have caused her to leave the matrimonial home, were rejected by the justices for the Dorking petty sessional Division on September 17,

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[3] [1919] P. 75.

[4] [1953] P. 103; [1953] 1 All E.R. 10.

1952, as being insufficient to support a charge of persistent cruelty. Although neither the notes of the evidence taken by the clerk to the Dorking justices, nor the reasons for the decision of that court, were formally put in or proved before the Sutton justices, those proceedings were frequently referred to, and the court accordingly allowed them to be read on this appeal.

[His Lordship referred to the proceedings at Dorking and continued:] It is the selection of August 16, 1952, as the end of the period of persistent cruelty, which has given rise to one of the chief difficulties in this case. The wife, whose charge of cruelty was one of maltreatment by the husband consisting of physical violence over the preceding 10 years, coupled with allegations of association with women throughout that period, and in particular with Mrs. D., gave evidence of an assault resulting in injuries to her mouth on August 16, 1952, as if that incident had been the culmination of the course of ill-treatment on which she relied. [His Lordship referred to the alleged assault of August 28, 1952, and also to the reasons given by the Dorking justices for their decision and continued:] We are, therefore, confronted with rival findings about substantially the same course of events, with regard to which at Dorking the husband's, and at Sutton the wife's, evidence has been preferred by those who had the advantage of seeing and hearing the witnesses. In those circumstances it is not easy to apply the directions to an appellate tribunal contained in *Watt or Thomas* v. *Thomas*.[1] It is true that the issue at Dorking was persistent cruelty up to and before August 16, 1952, whereas at Sutton the issue was desertion from September 4, 1952; but at Dorking the wife gave evidence on September 17, 1952, that things had become worse recently; and she spoke of the husband having said: "I will do you in before "I have finished with you"; and that he had threatened to take her life within the last two months; that it had worried her a great deal and frightened her. Finally, she had said matters had come to a head at the end of August, and that she had left home on September 4.

It appears, therefore, that whether anything after August 16, 1952, was, strictly speaking, admissible or not, the Dorking justices in fact had the wife's whole story before them, at least in general terms, up to and including her alleged expulsion from the matrimonial home on September 4, 1952, and there is no escape from the essential conflict between the findings of the two courts.

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[1] [1947] A.C. 484, 488; 63 T.L.R. 314; [1947] 1 All E.R. 582.

I should have felt happier about this case if the Sutton justices had particularized the conduct which they found to have caused the wife to leave home, and if there had appeared in the statement of their reasons any suggestion that they had appreciated the difficulties created by the decision at Dorking a few weeks before.

Dealing with the arguments which have been put forward on behalf of the husband, it is said that the wife is estopped per rem judicatam from making the charge of desertion at the Sutton court. Without going into detail, it will suffice to take as an example of the evidence on which that submission is founded the first three lines of her cross-examination on September 17, 1952:—"I remember hearing before Dorking " [justices]. My evidence is the same now. I saw probation " officer with husband. I told probation officer I could not " possibly go back to him because of his cruelty." I must not be taken to assume that it is literally accurate that her evidence was in every respect the same at Sutton as it was at Dorking, but the gravamen of the submission on behalf of the husband is that she is, in effect, saying, that she could not go back to her husband because of his cruelty, which ex hypothesi, had been found not to exist as a justification. [His Lordship referred to the visit to the probation officer and continued:] That brings me to the alleged incident on August 28, 1952, in connexion with the proposed expedition with Mrs. D. to Redhill. It is argued that if this incident was in the least serious, as part of the course of cruelty, it not only could have been, but ought to have been, included in the wife's complaint of August 29, 1952, and, therefore, that she should be estopped from relying on it now. But it is also argued that it cannot have been serious in fact, because if it had been the wife could not conceivably have overlooked it when she made her complaint on August 29, 1952. Alternatively, it was argued that there was no such incident, and that it was only a confused repetition of the incident of August 16, 1952, in connexion with the visit to Brighton. Out of such an argument, which is really directed to the weight of the evidence, it was obviously difficult to spell out an estoppel.

As regards the suggestion that there was no incident on August 28, 1952, and that it is merely a confused repetition of the incident of the 16th, it is worthy of note that although (I will assume for the reason suggested by her counsel in his argument), the wife gave no evidence in chief herself at Dorking and called no witnesses about the incident of August 28, 1952, the husband in cross-examination actually referred to an incident, which is admittedly identifiable with the incident corroborated at the Sutton hearing by Mr. and Mrs. Bettersworth, and that is again identifiable as the incident of the 28th.

Alternatively, it is argued on behalf of the husband that if this is not a case of estoppel, it is a case of which it could be said (reading from the headnote in *Pike* v. *Pike*,[2] a decision of the Court of Appeal) that " a charge of constructive desertion " cannot be proved by evidence of conduct, alleged to have caused " the petitioner to leave the matrimonial home, of the nature of " cruelty, but not amounting to cruelty in law." I do not think that it is necessary to read the whole case in detail. The point emerges quite clearly from one passage in Hodson L.J.'s judgment. He says [3] " I want to make it as clear as I can that when " the case sought to be made is in the nature of a case of cruelty, " it is not possible to build up a case of constructive desertion " by what is really a case of unproved cruelty." He goes on, " That, of course, does not cover the whole area of constructive " desertion, for grave and weighty matters might be alleged which " are quite different in kind and quite as serious, if not more " serious, than cruelty. One has in mind the well-known case of " *Russell* v. *Russell*,[4] where false charges were made, persisted in, " and not withdrawn, or, of course, one can have the simple case " of constructive desertion where there is merely an order or direction by one spouse to the other to leave, and if that order is " obeyed and the direction is followed and not withdrawn, then, " of course, again, desertion may run." We were also referred to *Edwards* v. *Edwards*,[5] and in particular to a passage in the judgment of Bucknill L.J. in which he commented [6] on some observations of Hodson J. in *Barker* v. *Barker*,[7] an appeal heard in this court. Bucknill L.J. said: " It is argued for the husband that " that is his case, and that the commissioner having found that " the husband was not cruel, there was no justification for the " wife's leaving. If Hodson J. meant to say that, once a charge " of cruelty has failed to be established, it is impossible for a wife

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[2] Post, p. 81; [1953] 1 All E.R. 232.

[3] Post, p. 87.

[4] [1897] A.C. 395; 13 T.L.R. 516.

[5] [1950] P. 8; 65 T.L.R. 419; [1949] 2 All E.R. 145.

[6] [1950] P. 8, 13–14.

[7] [1949] P. 219; 65 T.L.R. 49; [1949] 1 All E.R. 247.

" to establish grounds justifying her refusing to live with her " husband, with great respect to him I think that inconsistent " with the decisions to which I have referred, and that this court " ought to follow *Russell* v. *Russell*[8] and *Buchler* v. *Buchler*.[9] " I think, however,"—and this is the important passage—" that " that is not what Hodson J. meant to say. What I think he " meant to say was that either the blows inflicted by the husband " on the wife amounted to cruelty in that they injured her " health or were likely to injure her health, or they were not of " such a nature. If they were not of such a nature then "—and I emphasize the following words—" there being no other evidence " in the case at all, the court ought not to say that although " they were trivial blows in effect, they justified the wife in " leaving her husband."

In a nutshell, therefore, the argument for the husband is that this is an attempt to build up a case of constructive desertion by what is really a case of unproved cruelty, and more particularly it is an attempt to say that smacks delivered from time to time by the husband, which have been held not to have been such as to amount to cruelty, justify the wife in leaving her husband. I emphasize, however, as is apparent from the contexts of both those quotations, that the proposition depends upon there being no other evidence in the case at all. But here it is said that there was other evidence. There was evidence of the husband having turned the wife out, in other words, " an order or direction " by the husband to the wife to leave, acted upon and not with- " drawn." In her evidence-in-chief before the Sutton justices the wife said, " I left home on September 4, 1952, because he " said he had finished with me. He would not turn me out, but " he would go out more." It is said, as the context is alleged to show, that this was all part of the incident of August 28, 1952. I am not at all sure that that is so. The note at this part is by no means clear, and it may very well be that this, and an alleged threat to " do her in " of which she speaks, all occurred in what she calls " the week before we left," by which I presume she means the week before she left home. But then it is also said that the husband had withdrawn this direction to her to leave, if it was a direction to leave, at the interview with the probation officer on September 17, 1952, and that the wife's failure to communicate her acceptance of that offer cancelled anything that had been said previously about her clearing out. As regards the interview with the probation officer, if it was admissible at all, I do not think that it can fairly be said to amount to any more than an undertaking by the wife to think it over. I do not think that the justices were bound to accept the evidence given by the husband that the wife was satisfied, and expressed herself to be satisfied, with his promise not to hit her again, which he said he had given after the issue of the first summons. The question still remains, therefore, whether there was any evidence to justify a finding that the condition of things on September 4, 1952, was such that the husband was expelling the wife from the home.

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[8] [1897] A.C. 395.

[9] [1947] P. 25; 63 T.L.R. 100; [1947] 1 All E.R. 319.

I will deal first with the allegation of estoppel. If the case before the Sutton justices had been an attempt to make a fresh charge of persistent cruelty by including in the course of conduct relied on an alleged incident of August 28, 1952, that is to say, the day before her complaint to the Dorking justices, I should be inclined to hold that she was estopped from re-opening that charge. Obviously, the mere fact that there was better and more detailed evidence, supported by independent witnesses of that incident, would be irrelevant. But at Dorking, of course, there was no charge of desertion on September 4, 1952, before the court. It is true that, whether by amendment of the summons after she had left home or by the issue of a fresh summons returnable at the same time, all of which is a mere matter of machinery, desertion could have been put before the Dorking justices on September 17, 1952. But in my opinion the wife was not bound to put the charge of desertion before the Dorking justices under the penalty of being estopped from afterwards alleging that she had been deserted before the date of that hearing.

The matter can, perhaps, best be tested by supposing, for the sake of argument, that those steps had been taken, and that there had been before the justices at Dorking on September 17, 1952, both a charge of cruelty brought up to August 29, 1952, and a charge of desertion from September 4, 1952. Would the Dorking justices, having found that the charge of cruelty had not been proved, have been bound to dismiss the charge of desertion because it was an attempt to build up a charge of constructive desertion by what was really a case of unproved cruelty? In my opinion they would not, because of the evidence which (I am assuming for the purposes of the argument), the wife would have given, as she gave it at Sutton, about the husband telling her that he had finished with her. In other words, I am not prepared to hold that a court could not find that a husband who had admittedly smacked his wife in the face many times because he said that he was sick of being nagged by her about his going out and neglecting her, and who "did not remember" having threatened her, as she alleged, but said that if he did so he did not mean it seriously, ought not to be taken to mean what he says if he tells his wife at the end of it all that he had finished with her, even though he said that he would not actually turn her out, but coupled his statement that he had finished with her with the assertion that he would go out more than he did before, thereby implying that things would be worse than they had been before if she remained in the matrimonial home. In the passage that I have read from her evidence before the Sutton justices, the wife said that she had left home because he said this, and, although his conduct was held not to amount to cruelty, I cannot say that, coupled with his avowal that he had finished with her, it is impossible that it should be held to support a charge of desertion. For these reasons, unsatisfactory as I think it is that the wife's case should have been dealt with piecemeal by two courts which came to opposite conclusions about the credibility of the spouses, it is not, in my opinion, open to us to interfere with the decision under appeal, and, therefore, it is our duty to dismiss the appeal.

COLLINGWOOD J. I agree. I share the difficulty which Lord Merriman P. has expressed with regard to this case due to the course which was taken by the wife in issuing two summonses in different courts in respect of the two complaints. That difficulty has not been lessened by the form of the reasons of the Sutton justices.

The grounds of appeal are that the finding is wrong in law, that the issue had previously been decided by the Dorking justices and was thereby res judicata, that there was no evidence on which the justices could come to the conclusion at which they arrived, and that the decision was against the weight of the evidence. The question of quantum, which also appears in the notice of appeal, was not pursued.

[His Lordship referred to the evidence given before the Dorking and Sutton justices, and continued:] I agree with what Lord Merriman P. has said, that this is not a question of res judicata. It is not estoppel, because the issue before the Sutton justices was an issue different from that before the Dorking justices. But it has been further contended that in this case, as in *Pike* v. *Pike*, in the words of Denning L.J.,[10] "the "husband's conduct was either cruelty or it was not. It was "not something different from cruelty." Hodson L.J. makes the same distinction, when he says[11]: "I want to make it as clear "as I can that when the case sought to be made is in the nature "of a case of cruelty, it is not possible to build up a case of "constructive desertion by what is really a case of unproved "cruelty," and it is urged here that cruelty having been negatived by the Dorking justices at the first hearing, it followed that the wife's case on the ground of desertion failed also. That is the same argument as was presented in *Edwards* v. *Edwards*.[12] The material passage in the judgment of Bucknill L.J. has already been read by my Lord, and I only wish to repeat a small portion of it. The paragraph begins[13]: "It is "argued for the husband," and it is argued for the husband in this case, "that that is his case, and that the commissioner "having found that the husband was not cruel, there was no "justification for the wife leaving." Bucknill L.J. goes on to refer to the judgment of Hodson J. in *Barker* v. *Barker*,[14] and explains what he thinks Hodson J. really meant to say[15]: "What I think he meant to say was that either the blows "inflicted by the husband on the wife amounted to cruelty in "that they injured her health or were likely to injure her health, "or they were not of such a nature. If they were not of such "a nature then, there being no other evidence in the case at all, "the court ought not to say that although they were trivial "blows in effect, they justified the wife in leaving her husband."

Applying these criteria, the question which I ask myself is, is there in this case, in the words of Bucknill L.J., no other evidence at all? Is this a case where, if one negatives the wife's allegations of cruelty, the blows in the face, the threats to do her physical injury, if one finds that these blows and these threats were not of sufficient gravity to comply with the test in *Russell* v. *Russell*,[16] and that they neither did nor were calculated to injure her health, mental or physical, is there anything left which can be said to justify her in leaving the matrimonial home? In my opinion there was something in addition to the charges of cruelty simpliciter. In the first place there was his persistent preference for other women, carried to the length of his saying: "I would not take a thing like you "out" to his wife; there was the persistent association with Mrs. D. in particular, insisted upon over a period of between two and three years despite the wife's repeated protests, while at the same time he was insisting upon intercourse with his wife and coupling that with the intimation that if he could not get it he knew where he could get it outside the house, and this at a time when he was going out with this Mrs. D. There was no evidence that there was any impropriety in his association with her, but, nevertheless, he insisted on going out with her despite his wife's repeated protests and requests that he should cease to do so. Further, there was his habit of staying out late, night after night, again persisted in, although he knew the objection his wife had to it, and a perfectly natural objection; all these matters getting worse and worse until the end of August, 1952, when the wife said that matters came to a head. He was seeing more of Mrs. D., and hitting his wife's face when she protested, albeit not blows which injured her health or were calculated so to do. Finally, the wife says: "On September 4 I left home because he said he had finished "with me. He would not turn me out, but he would go out "more himself." In other words, the cause of all the wife's unhappiness for the past year or two was to be accentuated; what he knew to be the cause of his wife's unhappiness he was going to make worse, and deliberately make worse.

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[10] Post, pp. 81, 88.
[11] Ibid. 81, 87.
[12] [1950] P. 8.
[13] Ibid. 14.
[14] [1949] P. 219.
[15] [1950] P. 8, 14.
[16] [1897] A.C. 395.

In those circumstances it is, in my opinion, impossible to say that there was no evidence upon which the justices were entitled to find, as they did, that his conduct caused her to leave and justified her in leaving the matrimonial home. In my opinion the conduct which did so cause her to leave was of a different kind from, and not merely something less than, cruelty. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Langhams & Letts for Hart, Scales & Hodges, Dorking; Kinch & Richardson for Pringle & Co., Redhill.*

J. B. G.

NOTE

PIKE *v.* PIKE.

1952
Nov. 19, 20.

Singleton, Denning and Hodson L.JJ.

Husband and Wife—Divorce—Desertion—Cruelty—Pleadings.

The wife, in her petition dated May 12, 1951, for divorce on the ground of desertion, gave the following particulars of her allegation: "By reason of the respondent's conduct towards the petitioner, the "petitioner was forced to leave the matrimonial home. . . . The "respondent would refuse to provide the petitioner with money for "household expenses, and in July, 1947, when the petitioner informed "him that it was necessary for her to be X-rayed because of chest "trouble, he informed her that he would love to see her in a sanatorium "and that she was neurotic and not fit to live with him. The respon-"dent further informed the petitioner that he did not desire to live "with her and that it was cheaper for him to provide her with an "allowance. Since October 17, 1947, the petitioner and the respondent "have lived separate and apart." The husband in his answer denied the allegation of desertion; and although no specific allegation of cruelty had been made, denied, also, that he had been guilty of cruelty.

Towards the end of his judgment the commissioner said: "It is no "part of my task to decide whether he was guilty of actual cruelty, but "accepting, as I do, the wife's story, it is undeniable that he virtually "drove her out of the house and was guilty of what the law knows as "constructive desertion. I am perfectly convinced that by reason of a "continual course of conduct he made it impracticable for her to live "with him any longer. She had made every effort to live with him "and had borne privation, harsh treatment, and insult after insult, "culminating in a scene in which he threatened to choke her."

Appeal from a decision of Mr. Commissioner Goodman Roberts Q.C. sitting as a special commissioner, whereby on July 29, 1952, he granted a decree nisi of divorce to the wife on the ground of desertion.

The following statement of facts is taken from the judgment of Hodson L.J.: The parties were married in 1942, the husband being then 31 years of age, and the wife 21 years of age; the husband was serving in the Royal Air Force, and the wife stayed with her mother. The husband was stationed in Yorkshire for some time, and the wife stayed in Wales because she did not like the accommodation which he was able to offer in Yorkshire; and according to him she wanted to save up towards a home. In 1944, when he was moved to Malmesbury, the same situation continued; he was always wanting her to join him, and he was disappointed because she did not, so that the situation became strained between them. She became pregnant, and a child was born in July, 1946: at that time they had become reconciled. During the year 1946 the husband left the Royal Air Force and went back to his work as a civil servant, going to Cheltenham. The wife at this time was still with her mother in Wales, and she remained there until January, 1947. During the whole of this time up to and after the time when the husband left the Royal Air Force he was sending her £12 a month, as the commissioner finds in his judgment, so that no question of privation, which was one of the matters alleged, could be said to exist up to that time. She was living with her mother of her own choice; he was sending this allowance to her for herself and, when the baby came, for herself and the baby. From January, 1947, onwards, there were further troubles because he obtained the lease of a house in Cheltenham, and wanted her to come and live there. There was a dispute: he thought that she was unreasonable in not coming, and she thought that she had good reason for putting off her arrival. By March, 1947, the tension was such that the husband consulted solicitors, who wrote a letter to the wife saying that the husband had got a house in Cheltenham and that he had repeatedly written asking her to join him with their son. The letter continued: "We have before us your letter of March 10, 1947, which "you sent to our client, in which you say that you are prepared to join "him provided that he sends you sufficient money to pay your debts. "We are unable to agree that this is a reasonable condition but we are "to say on behalf of our client, that provided you are prepared to join "him in Cheltenham at once and will then let him have details of "any accounts that may be owing, he will pay them provided they are "reasonable and proper. We would also point out to you that whilst "you are not legally bound to live with your husband, there is a moral "obligation on your part to join him at the home which he has provided "and to perform your duties as a wife. . . ." It was stated in the last paragraph that the husband would not accept responsibility for any debts that the wife had incurred if she would not come and live with him.

In the following month the wife came to the house with the child, accompanied by her aunt; she stayed there until July, 1947, when it was arranged quite amicably, as the correspondence showed, that she should go for a three weeks' holiday with her mother. The matter is relevant because the case as pleaded in the petition was that the wife was driven away in July, 1947, in particular by the unkind observation that since it was necessary for her to be X-rayed because of chest trouble he, the husband, would love to see her in a sanatorium, that she was neurotic, and that she was not fit to live with him. That allegation fell to the ground because that was not the position. The case as presented was that a conversation of that nature took place later, when the husband was visiting the wife in Wales. In a letter dated July 31, 1947, the wife wrote: ". . . About coming home—I was "wondering if you'd care to come down this week-end and then I could "travel back with you on the Monday or Tuesday or whenever you go "back, otherwise let me know when you'll be working next week, as "I thought I'd come back on Thursday as the trains wouldn't be so "full. . . ." There was a further letter of August 6, 1947, to the husband which referred to his proposed visit that week-end. It appears that the husband did go down for the week-end; and there must have been some discussion which did not end too happily between them as to whether she should come back or not. It is in that connexion that the wife's allegation appears to have been made about "laughing," not "loving," to see her in a sanatorium. She did not come back at that time; and on August 11, 1947, the husband received a letter from the wife's solicitors complaining of the unhappy differences which had arisen between them, of the insufficient money on which she had had to live, of the small contribution, namely £1 a week, which the husband had made towards the maintenance of the home, and of statements which he had made when he had visited her in Wales. The husband replied on August 14, 1947: "Thanks for letter of 11.8.47. Most of the state- "ments therein are travesties of the truth and would not be supported "by facts that could be ascertained. My wife is aware that I am "willing to maintain her at Cheltenham. She was informed last March "by my solicitors that I could not keep her if she insisted on living with "her mother."

On August 18, 1947, the wife issued a summons in a court of summary jurisdiction on the ground of desertion, which was due to be heard on August 29, 1947. One of the features in this case is that no reference was made in the petition to this earlier summons. [A similar summons was issued on October 21, 1947, and heard on December 12, 1947, when the wife was granted an order, as appears below.]

It is a significant fact that the wife, in those circumstances, issued the summons of August 18, 1947, alleging that her husband had deserted her when, on the face of it, it could hardly appear that that was the case. The husband was determined to fight the summons. He instructed solicitors, and (as was to be expected), he was told that the probation officer had been asked to intervene to see if a reconciliation could be effected, and it would seem that the husband was told by his solicitors to see the probation officer before he attempted to fight the case. The matter was then adjourned generally, and did not come before the court again, but an interim order was made directing the husband to make payments for the maintenance of his wife and child until the final determination of the case. This was resented by the husband, who said that he had already written out cheques, and that there was no necessity for any order to be made. His attitude throughout was that he had not deserted his wife, and he was not prepared to submit to any order on that basis. That has remained his attitude throughout.

The wife came back for three days on October 14, 1947; that was the last time that they were together. That return appears to have been brought about with the help no doubt, so far as the wife was concerned, of the solicitors and the probation officer, with the object of a reconciliation being effected. The husband described those last few days as "pandemonium"; the parties did not settle down again, and at the end of the three days the wife finally left and went back to her mother.

The commissioner's finding as to how those three days ended was as follows: "On Friday, October 17, 1947, the wife says that the husband "came home about half-past six. She had made a meat pie and some "baked beans on toast. He wanted cabbage and said if he could not "have cabbage he would not have anything. His own version is that "there was corned beef and potatoes, and no green vegetables that she "could easily have got. At any rate, there was another tiff about this. "But the matter ended more seriously because the wife went upstairs "and later on came down in a dressing gown and began to write a "letter. She says that her husband began to talk, and that she took "no notice, and that he then said, 'I will choke you.' His version is "entirely different: he says that he got back and that she would not "give him any food and flared up; that he buried his head in his hands "not knowing what to do, and finally stood up determined to get the "food for himself, and that she shrank back as if she was going to be "struck; that he did not say anything, but merely laughed at her to "ease the tension, and that she rushed to the door saying: 'You are "'mad.' I am quite satisfied that the wife ran from the house because "she was terrified of her husband's attitude. This can be the explanation of a woman at that time, in a dressing gown, rushing for succour "to a neighbour's house. It has been established in evidence that [the "neighbour] is a comparative stranger, and it has also been shown that "the wife was so terrified that she would not go back to her own house "unless she were accompanied by the neighbour, with whom she went "back." The commissioner continued: "I am quite satisfied that the "husband flounced out of the house after giving his wife the money, "and told her that she should go back to Wales. Having regard to the "intemperate language which he used in his letters and the libellous "postcards which he subsequently sent I think that I am justified in "accepting the wife's statement that he upset her on that occasion and "that she was terrified and was obliged to go back to her mother the "next day." That is the scene which the commissioner finally described in the paragraph in which he said: "She had made every effort to live "with him and had borne privation, harsh treatment, and insult after "insult, culminating in a scene in which he threatened to choke her."

On October 21, 1947, the wife issued a second summons on the ground of desertion. After the wife left, her husband had consulted solicitors, and on October 20, 1947, a letter, which was not produced, was written to the wife's solicitors, with a view to getting the wife to return. On October 21, 1947, the wife's solicitor wrote to the husband's solicitors saying: "I have your letter of the 20th instant herein. You have been "wholly misinstructed in this matter, as your client in point of fact "left his wife; he provided no money for her maintenance and his "conduct towards her was such that she was forced to leave him. Moreover, he told her to go back to Wales and he wishes nothing more to "do with her. He also told her that it was only through persuasion "that he took her back at all, in order to put himself right in the eyes "of the court. My client journeyed to Cheltenham in the hope that "your client was sincere when he stated that he wished her to return. "His conduct did not bear this out at all and it is evident from the "way he acted that he did not wish his wife to remain with him. There "are matters which the wife can give in evidence, but which are of "too delicate a nature to be put in writing, and these matters will "be brought to the notice of the court in due course. My client has "made a serious attempt to resume married life with your client, but "apparently he was not bona fide in his suggestions to resume married "life, and in point of fact from the outset the only thing he wished to "do was to avoid having to pay towards his wife and child. My client "has issued a summons against her husband and this will, of course, "be heard in due course." That letter was written on the same day as the issue of the summons, and on October 22, 1947, the husband's solicitors wrote a letter to the wife's solicitors saying: "Dear Sir, We "have your letter of yesterday's date. The facts as stated therein are "not admitted. Our client is anxious that his wife should return to "live with him and as she knows the house is open to her. We enclose "a cheque from our client in respect of the maintenance of your client "and the child, and to assist her in the payment of the travelling "expenses."

Neither of those two letters was referred to in any way as part of the wife's case, although as this was a case of desertion and not of cruelty it was an essential part of the wife's case to put in any letters, and to refer to any interviews, which had to do with offers to return.

The wife's examination-in-chief was concluded by her counsel asking what happened in Cheltenham after those last three days in October, 1947. She was asked whether she went home to Neath, and she said that she did; and the next question was this: "Did you make a complaint to the court of summary jurisdiction at Neath? (A.) Yes. "(Q.) On December 12, 1947, did the magistrates make an order "adjudging that he had deserted you? (A.) Yes." No reference was made to the fact that there had certainly been one letter from the husband which, on the face of it at any rate, contradicted the desertion.

The letter of October 22, 1947, does not appear to have been answered, and the wife's case, as put by her solicitor, was that the husband's conduct during this period in October, 1947, was such as to show that his expressed wish for the wife to return was not a genuine one.

The wife proceeded with her summons for desertion, which was heard on December 12, 1947, by the justices, and which resulted in an order being made in her favour. The husband said that thereafter, when his wife came for her belongings, he asked her to return, and that she refused. That was denied by her; she did not deal with any other specific request which he made to her to return, but she dealt with the question generally when the commissioner put to her the question: "Have you ever had an offer which you regarded as genuine?" to which she answered "No." Upon that state of the evidence the commissioner found inferentially, if not expressly, that the husband's requests to the wife to return were not in fact genuine, and accordingly he found that the husband had driven the wife from the house, and so was guilty of desertion.

The appellant husband in person.
W. A. Macpherson for the wife.

SINGLETON L.J. I will ask Hodson L.J. to give the first judgment.

HODSON L.J. read the allegation of desertion set out at the beginning of this Note and referred to the nature of the answer. His Lordship said that the commissioner had been concerned to see that the husband, who had appeared in person, enjoyed all the assistance which he (the commissioner) felt able to give him. The commissioner had paid tribute to the fair manner in which the husband had conducted his cross-examination of the wife, but had reached the conclusion that the evidence of the wife was to be believed where it conflicted with that of the husband, who had not, however, made inaccurate statements maliciously, but was bitter and had got into a state of mental anxiety and confusion.

His Lordship continued: It is to be remembered that this man was not charged with cruelty; he was charged with desertion. It is quite true that it is described as constructive desertion, which means that it is not suggested that he left his wife, but that he somehow or other forced her to leave him. The danger in this class of case, as I see it, is that a person who is alleging constructive desertion without charging cruelty may be, in effect, making allegations of the character of cruelty which do not amount to cruelty, and that having done that, may come to the court and say: "It is quite true that I have made out no case "on cruelty, but I have made out a case of constructive desertion, "because the conduct of the other side was so bad that in the result "there are grave and weighty reasons why I should not be compelled "to live with him any longer"; but, of course, the real issue in the case is whether the married life has been brought to an end by one party driving the other out, and whether that desertion has continued for three years immediately preceding the presentation of the petition, so that one has always to consider, even if there has been a driving out, what has happened since the driving out. In this case it has been a little difficult, in fact very difficult in this court, and no doubt it was very difficult for the commissioner to find out exactly what the sequence of events really was, and that difficulty has been made the greater because the pleaded case was not the case which formed the basis of the judgment. The basis of the judgment was that in October, 1947, the wife was driven out. Towards the end of his judgment the commissioner put his conclusion in this way: "It is no part of my task to "decide whether he was guilty of actual cruelty, but accepting, as I do, "the wife's story, it is undeniable that he virtually drove her out of "the house and was guilty of what the law knows as constructive deser-"tion. I am perfectly convinced that by reason of a continual course "of conduct he made it impracticable for her to live with him any "longer. She had made every effort to live with him and had borne "privation, harsh treatment, and insult after insult, culminating in a "scene in which he threatened to choke her."

Having read the particulars which had been given, it will be apparent that there is no reference in those particulars to what amounts to a very grave threat. The threat to choke appeared in the evidence of the wife at the trial, and we were told, although this matter was not gone into, that reference had been made to that in earlier proceedings in a court of summary jurisdiction. Moreover, in the case as pleaded there is no indication that the actual driving out took place on October 17, 1947. The reference in the particulars to conduct ends in July, 1947. The only reference to October, 1947, is a bare statement: "That since October 17, "1947, the petitioner and the respondent have lived separate and "apart." In those circumstances, with no amendment of the pleading so as to charge cruelty, or even to charge a case of constructive desertion from October 17, 1947, the case seems to have been fought on a different ground from that which was pleaded. That would not necessarily be a ground either for a new trial or even for disturbing the finding, as Mr. Macpherson pointed out, if once this court could be satisfied that the true issues between the parties had been contested in the court below, and if an opportunity had been given to deal with those issues, but unfortunately, in my view, justice has not been done in this case. [His Lordship then considered the history of the married life as set out above and continued:]

In my judgment, the decision cannot stand. The case of driving away made out by the petitioner was substantially different from that pleaded in substance and also in time. There was really no evidence at all of privation, upon which the commissioner relied in part, and I have already referred to the fact that the husband had made an allowance to the wife until the house was ready. Afterwards she was living with her mother until she joined him, and as to the husband's alleged meanness in providing an adequate housekeeping allowance during the period when they were together, the husband was stopped in his cross-examination of his wife on this point, and the commissioner at that time expressly said that it would not affect his mind on the issue of constructive desertion. Apart from this, there was no other grave and weighty matter relied upon as amounting to constructive desertion unless it consisted of cruelty. No cruelty was alleged in terms, and the serious allegation of threatening to choke the wife was not referred to at all in the petition, and, moreover, there was no corroboration of that charge.

I want to make it as clear as I can that when the case sought to be made is in the nature of a case of cruelty, it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty. That, of course, does not cover the whole area of constructive desertion, for grave and weighty matters might be alleged which are quite different in kind and quite as serious, if not more serious, than cruelty. One has in mind the well-known case of *Russell* v. *Russell*,[1] where false charges were made, persisted in, and not withdrawn, or, of course, one can have the simple case of constructive desertion where there is merely an order or direction by one spouse to the other to leave, and if that order is obeyed and the direction is followed and not withdrawn, then, of course, again desertion may run. This case was never made out on those lines. Indeed, the letter of October 22, 1947, from the solicitors, in which the husband asked his wife to come back, was never dealt with; it was not put in at all as part of the wife's case. I am not blaming anyone in that regard, because there seems to have been considerable difficulty about the correspondence; the husband was in person, and at the end of the wife's examination-in-chief there was some discussion about the correspondence, and, as the husband appeared to be objecting to some of the letters, the question of putting in particular letters seems to have been postponed, and perhaps in the end forgotten. No case of desertion was, however, made out on the simple lines of an order to go and never withdrawn. On that basis the finding cannot stand.

If it should be said that there was a case of cruelty, and the matter, although not specifically raised, was dealt with between the parties, and therefore the remedy open to the husband in this court is to obtain an order for a new trial, my answer is in this case that is not the right way in which to proceed. A serious charge like a charge of

[1] [1897] A.C. 395.

cruelty which is, after all, the substantive case which, as I understand it, the wife was trying to make, ought to be pleaded as such and dealt with as such, and no injustice could possibly be done to her, because if she has a case of cruelty any finding of this court that she has not made out a case of desertion does not operate as an estoppel in any cruelty proceedings which she may, if so advised, bring in the future. Nothing that I say, I hope, will encourage her to take such a step, but I merely draw attention to the fact that no charge of cruelty has been disposed of either in the court below or in this court.

For these reasons I think the appeal should be allowed.

DENNING L.J. This is yet another case in which the doctrine of constructive desertion has been allowed to run wild. A wife leaves the home, refuses to return to it, and then promptly charges her husband with constructive desertion. He asks her to come back, but she refuses. There are three letters of August 14, 1947, and October 20 and 22, 1947, in which he made it clear that he wanted her to return, and she would not. No one can doubt that he was ready to take her back if she returned, but yet he has been held guilty of desertion. Her only justification for not returning is that, she said, his previous conduct justified her. If he had previously treated her with cruelty, so much so that there was a reasonable apprehension of injury to her if she went back, she would, of course, be justified in refusing to go back, but if his conduct was less than cruelty recognized by law, then I do not think that she was justified.[2] There may be conduct different from cruelty—not less than it—which gives her reasonable cause for staying away, as in *Russell* v. *Russell*[3]; but even such conduct does not automatically make him guilty of desertion. In order to make him guilty of constructive desertion, there must be an intention by him to bring the matrimonial consortium to an end. Any other view would mean that, under the guise of constructive desertion, there would be introduced new heads for divorce not authorized by the statute.

In the circumstances of this case, the husband's conduct was either cruelty or it was not. It was not something different from cruelty. In order for the wife to justify her refusal to return, the only thing that she could rely on would be the husband's cruelty, and in such a case cruelty must be pleaded and proved. Just as in a civil action fraud must be distinctly alleged, and as distinctly proved, so in this class of action cruelty must be distinctly alleged and as distinctly proved. In this case the particular allegations which the commissioner set out in his judgment were not alleged in the petition; and no application to amend was ever made. I do not think that the petitioner should be allowed in those circumstances, to rely on new charges of cruelty which were never alleged.

If her case had been that the request to her to return was not genuine in the sense that he never really wanted her to come back,

[2] In *Timmins* v. *Timmins* [1953] 1 W.L.R. 757, 761–2, Denning L.J. explained that by "conduct less than "cruelty" he meant conduct which was not of a grave and weighty character and was for that reason not cruelty.

[3] [1895] P. 315; affirmed [1897] A.C. 395.

that would have been a different matter. In such a case, as we said in *Barnard* v. *Barnard*,[4] the best way of seeing whether the offer is genuine is to accept it and see whether he will take her in, but the wife did not suggest here that the offer was not genuine in that sense. There is no doubt that the husband wanted her back. She only said that she was justified in not going back because of his previous cruelty. That ought to be alleged and proved, and it was not even alleged. Her only proper course would have been to charge cruelty.

It is open to her, no doubt, to bring another petition now charging cruelty, but I certainly would not wish to encourage it. I agree that the appeal should be allowed.

SINGLETON L.J. I agree that the appeal should be allowed.

Appeal allowed.
Decree nisi set aside and petition dismissed.

Solicitors: *Sharpe, Pritchard & Co. for T. D. Windsor Williams, Neath, Glam.*

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[4] (Unreported): November 18, 1952 (Final List of Appeals, No. 17).

IN THE ESTATE OF PARK, DECD. PARK v. PARK.

[1951 P. No. 1348.]

1953
May 15,
18, 19;
June 12.

Karminski J.

Husband and Wife—Marriage—Capacity to enter into marriage contract—Requisites—Previous probate action—Party sued as "widow"—Jury's finding that deceased mentally incapable of executing will made on marriage day—Estoppel—Jury's finding not binding on court considering mental capacity to marry.

A mere comprehension of the words of the promises exchanged at a ceremony of marriage is not sufficient to establish capacity of the parties to consent to the marriage at the time. The minds of the parties must also be capable of understanding the nature of the contract into which they are entering free from the influence of morbid delusions on the subject; and the essence of the contract is an engagement between a man and a woman to live together and to love each other to the exclusion of all others. Submission on the part of the woman may no longer be an essential part of the contract; but so far as the husband is concerned there is still the duty to maintain and to protect.

The defendant in this probate action sought to establish that the deceased was at the time of his marriage to the plaintiff incapable of appreciating the nature of the marriage contract, and the duties and responsibilities which it created, and that accordingly there was no consent to the marriage; and he asked the court to declare the marriage null and void and to pronounce in solemn form for a will executed before the ceremony. The plaintiff, the widow of the deceased, sought to have that will pronounced against, alleging that it had been revoked by marriage; and she claimed that the deceased had died intestate.

In a previous probate action (The Times, December 2, 1950), in which the present plaintiff was the defendant and the present defendant adopted the pleadings of the plaintiffs, the present plaintiff had succeeded in having an alleged will of the deceased, which purported to have been executed a few hours after the marriage ceremony, pronounced against on the ground that the deceased was not of sound mind, memory and understanding and that he did not know and approve of the contents of the will:—

Held, after consideration of the evidence before the court, that the deceased understood the nature of the contract he was entering into and that the marriage in fact performed constituted a valid and binding marriage, and that, since the will executed before the marriage was thereby revoked, the deceased died intestate.

The plaintiff further alleged in her reply to the defence and counterclaim that the defendant was estopped from alleging that she (the plaintiff) was not the lawful widow of the deceased on the ground that in the earlier action he and others had sued her as the lawful widow of the deceased.

Held, that there was no estoppel, for there was a vital difference between the state of affairs where matters have been in issue in previous proceedings and the state of affairs where they might have been. At no time in the previous probate proceedings was the issue of the validity of the marriage before the court at all.

PROBATE ACTION.

The plaintiff, Mrs. Wyn Blodwen Park, claimed as the lawful widow and one of the persons entitled in the event of an intestacy to share in the estate of Robert John Charles Park, who died on June 17, 1949, to have an alleged will of the deceased dated March 1, 1948, pronounced against and to have a grant of letters of administration of the estate of the deceased. The defendant, Peter Park, was the principal residuary legatee under the will of March 1, 1948, under which the plaintiff took no interest.

The deceased, then 78 years of age, had gone through a ceremony of marriage with the plaintiff at the register office, Kensington, on May 30, 1949. Later on the day of the ceremony the deceased purported to execute an elaborate will, by which the plaintiff would have benefited to a relatively modest extent in his estate, which was stated to exceed at least £120,000.

On December 1, 1950, in a probate action before a jury (*In re Park; Culross* v. *Park*, The Times, December 2, 1950), in which the executors of the will of May 30, 1949, were the plaintiffs (the present defendant and his brother adopting their pleadings) and in which the present plaintiff, Mrs. Park, was the defendant, the jury found that at the time when the will was executed the deceased was not of sound mind, memory and understanding, and that he did not know and approve of the contents of the will. Pearce J. accordingly pronounced against the will.

In the present action the defendant alleged by his defence that at the time of the ceremony of marriage on May 30, 1949, the deceased "was of unsound mind and mentally incapable of "appreciating the nature of the marriage contract and the duties "and responsibilities which it creates, and that in the premises "there was no consent by the deceased to the marriage, and the "said ceremony was a nullity." It was alleged that the deceased suffered from serious depression after the death of his former wife, to whom he had been married for some 50 years, in January, 1948, and that after a stroke in May, 1948, "he lost his grip on "personal and business affairs and rapidly fell into a state of "senility and second childhood, rendering him incapable of sound "judgment on any serious matters affecting his life and interests."

The defendant claimed a declaration of nullity of the marriage in fact celebrated and asked the court to pronounce for the will of March 1, 1948, in solemn form.

The plaintiff denied that the deceased was not capable of appreciating the nature of the marriage contract and the duties and responsibilities which it created, and denied that there was no consent and that the ceremony was a nullity. She further contended that the defendant was estopped from alleging that the plaintiff was not the lawful widow of the deceased, on the ground that he had sued the present plaintiff in the 1950 probate action as the lawful widow of the deceased, and that the validity of the will of May 30, 1949, was litigated in the action upon the basis that the present plaintiff was the lawful widow of the deceased, and that the court, after pronouncing against the will, had ordered that she should be paid her costs of the action (other than on an issue of undue influence) out of the estate, upon that basis.

She further contended that the will of March 1, 1948, had been revoked by the marriage of May 30, 1949.

[The facts and the evidence are fully stated in the judgment.]

It was agreed that the case for the defendant should be opened first. At the conclusion of the plaintiff's evidence, and before argument upon the main issue, argument was heard upon the issue of estoppel which had been raised in the reply.

Gilbert Beyfus Q.C. and *C. A. Marshall-Reynolds* for the plaintiff. In the previous proceedings the present defendant

1953

IN THE ESTATE OF PARK, DECD. PARK v. PARK.

adopted the pleadings of the executors, who were the original plaintiffs in the action. They had sued Mrs. Park as " the lawful " widow and relict of the deceased," and it was on that basis that the writ had been issued and costs paid. Her position was similar to that of the wife in *Woodland* v. *Woodland*,[1] who had previously obtained a decree of restitution of conjugal rights in a suit in which the husband had not put the validity of the marriage in issue, and who successfully submitted that the husband was later estopped from alleging that the marriage was null and void. There was less merit in the plea of estoppel in that case, for there was not, as in this case, a full knowledge of the facts at the time of the earlier proceedings. [Reference was also made to *Humphries* v. *Humphries*.[2]]

Cyril Salmon Q.C., *John B. Latey* and *Helen Shore* for the defendant. *Woodland* v. *Woodland* [3] is a matrimonial cause and clearly distinguishable, for the validity of the marriage was an essential element in the prayer for restitution. In the first probate action the validity of the marriage was not in issue and, although Mrs. Park had entered a caveat describing herself as the widow, that was merely a descriptive term in the preliminary proceedings. There was no substantive allegation in the body of the pleadings and the court never pronounced upon it. [*Boileau* v. *Rutlin* [4] was referred to.]

Cyril Salmon Q.C., *A. Richard Ellis* and *John B. Latey* for certain parties cited.

May 19, 1953. KARMINSKI J. This is a preliminary point by way of estoppel which has been raised by the plaintiff in the present action. She says that in a former action the present defendant sued her as the lawful widow and relict of Mr. Robert John Charles Park, deceased. In that former litigation the question in issue was the validity of a will, or alleged will, of the deceased dated May 30, 1949; and that will, after a long hearing, was pronounced against on the issue of incapacity. The further attack made on that will on the basis of undue influence failed, and in the result the present plaintiff succeeded in that the court pronounced against the will of May, 1949. It is said in the present case that that decision was upon the basis maintained by the present defendant and others that she was the lawful widow and relict of the late Mr. Park. On that basis she now says that the present defendant is estopped from alleging that she is not the lawful widow and relict of the late Mr. Park.

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[1] [1928] P. 169; 44 T.L.R. 495.

[2] [1910] 1 K.B. 796.

[3] [1928] P. 169.

[4] (1848) 2 Exch. 665, 680.

I thought it desirable to hear argument upon this point before dealing with the facts and merits of the present case. It is fair to Mr. Beyfus to say that the matter was argued rather on my insistence than on his, and it was not put by him in the forefront of his defence to the allegation in the present suit that the present plaintiff was never in fact or in law lawfully married to the deceased. I am bound to say that I can understand the lack of enthusiasm shown in relying too much on this matter by Mr. Beyfus. I am quite unable at the moment to see how it can be said that the present defendant is estopped.

The earlier proceedings were the result of a caveat to the will of May, 1949, entered by the present plaintiff. In due course that caveat was warned, and on July 11 there was an appearance by her to the warning in which she was described by her solicitors, who were the same firm who are acting for her now, as "the "lawful widow and relict of the deceased," and one of the persons entitled to share in his estate in the event of an intestacy. The action then proceeded. A writ was issued by the plaintiffs in that action, who were the executors of the pretended will of 1949, and in their writ they described the present plaintiff as "the lawful widow and relict of the deceased," a description she had given to herself, and which was not then, and was not indeed at any time, an issue in that case. Later, by an order of this court, the defendant in the present action, that is, Mr. Peter Park, and his younger brother, then a minor, were added as plaintiffs and adopted the original plaintiffs' pleadings. It must be emphasized that at no time during the earlier proceedings was the issue of the validity of the marriage, or pretended marriage between Mr. Park and the present plaintiff, of May 30, 1949, before the court at all. It is said by Mr. Beyfus that it could have been and ought to have been raised, but in my view it was difficult for anybody to do that in the state of knowledge of the case at the moment it came to trial.

It is said, and no doubt with force, that subsequently matters came to light during the trial of the first case, and to some extent later, which had given ground for the assertion in the present case that there was no marriage. Authority was cited to me by Mr. Beyfus in support of his contention, but the case on which he relied, *Woodland* v. *Woodland*,[1] was a decision on very different issues. In that case there had already been pronounced by this court a decree of restitution of conjugal rights. Subsequently matters came to light which gave reason for at any rate a belief that the wife who had obtained that decree was already married to another person at the time of the ceremony of marriage with the other spouse in that case. But it was held by Hill J. that that could not be reopened, because, as he put it, a decree of restitution[2] "is a final decree and it can only be "made upon the finding of status—namely, that the husband "and wife were and are lawful husband and wife." Hill J. then quoted from a well-known passage in Stephen's Digest of the Law of Evidence, apparently with complete approval. The quotation on which he seems to have relied is this: "'Every "'judgment is conclusive proof as against parties and privies "'of facts directly in issue in the case, actually decided by the "'court and appearing from the judgment itself to be the ground "'on which it was based: unless evidence was admitted in the "'action in which the judgment was delivered which is excluded "'in the action in which that judgment is intended to be "'proved.'" I regard that as a classic exposition of the law on the subject, and I think that it is clear that Hill J. also so regarded it.

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[1] [1928] P. 169; 44 T.L.R. 495.

There is, as it seems to me, a vital difference between the state of affairs where matters have been in issue in previous proceedings and the state of affairs where they might have been.

In an often quoted passage in *Boileau* v. *Rutlin*,[3] Parke B. said this: "It would seem that those, as well as pleadings "at common law,"—and he was referring there to bills of equity—"are not to be treated as positive allegations of the "truth of the facts therein, for all purposes, but only as state- "ments of the case of the party, to be admitted or denied by "the opposite side, and if denied to be proved, and ultimately "submitted for judicial decision. The facts actually decided by "an issue in any suit cannot be again litigated between the same "parties, and are evidence between them, and that conclusive, "upon a different principle, and for the purpose of terminating "litigation; and so are the material facts alleged by one party, "which are directly admitted by the opposite party, or indirectly "admitted by taking a traverse on some other facts, but only if "the traverse is found against the party making it. But the "statements of a party in a declaration or plea, though, for the

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[2] [1928] P. 169, 172.

[3] (1848) 2 Exch. 665, 680.

"purposes of the cause, he is bound by those that are material, "and the evidence must be confined to them upon an issue, "ought not, it should seem, to be treated as confessions of the "truth of the facts stated." There, I think, is the vital distinction between Mr. Beyfus's argument and the present case, and I am bound as I think to hold that this defence of estoppel fails.

I will only add this, coming for the moment from the faintly academic to the purely practical, that had I found Mr. Peter Langley Park, the present defendant, was estopped from asserting the invalidity of the present marriage I should have had no difficulty in giving leave to amend the pleadings by adding other defendants who have interests in this case contrary to those of the plaintiff. I say that because this case has already been litigated twice; or, more accurately, has been litigated at great length once and has been litigated almost, but not yet quite completely, at considerable length for a second time. I am, so far as lies within my power, determined that this estate shall not by any technicalities be put to the expense of a third suit.

Argument was then heard on the further issues.

Cur. adv. vult.

June 12, 1953. KARMINSKI J., reading his reserved judgment, said: Robert John Charles Park, to whom I shall subsequently refer as "the deceased," died on June 17, 1949, aged 78. On May 30, 1949, he went through a form or ceremony of marriage with the plaintiff in the present action. On the same day, and within a few hours after the ceremony of marriage, he purported to execute a will. On December 1, 1950, a jury found that at the time of the alleged will of May 30, 1949, purported to have been executed, the deceased was not of sound mind, memory and understanding, and accordingly Pearce J. pronounced against that will. In the present action the plaintiff claimed as the lawful widow of the deceased to have a pretended will of the deceased dated March 1, 1948, pronounced against and for the grant to her of letters of administration of the estate of the deceased. The defendant was a residuary legatee under the will of the deceased. No suggestion is made against the validity and force of the 1948 will other than this: if the plaintiff and the deceased were lawfully married on May 30, 1949, then the will of March 1, 1948, was revoked by that marriage and the deceased died intestate.

The defendant alleged by his defence that at the time of the ceremony of marriage in May, 1949, the deceased was of unsound mind and mentally incapable of appreciating the nature of the marriage contract, and that there was not and could not be any consent by him to that marriage. That defence was fully developed in the substance of case. By way of counterclaim the defendant claimed a declaration that the alleged marriage between the plaintiff and the deceased in May, 1949, was null and void; and he further asked that the court should pronounce in solemn form in favour of the will of March 1, 1948. By her reply the plaintiff denied that that ceremony of marriage was a nullity and asserted that the will of March 1, 1948, was revoked by her marriage to the deceased on May 30, 1949. The reply also contended that the defendant was estopped from alleging that the plaintiff was not the widow of the deceased; but for the reasons which I have already given and will not repeat, I find that he is not so estopped.

The issue before me, therefore, is this: were the plaintiff and the deceased lawfully married on May 30, 1949? As to the form of the ceremony, which took place at the Kensington register office, there is not and never has been any dispute. What is in issue is the consent of the deceased to that marriage and whether he had the capacity to consent to that marriage at that time. On that issue it was at once accepted by Mr. Salmon for the defendant that the burden lay on him to prove that a marriage regular in form was in fact invalid through the incapacity of the deceased to consent to it. Assuming that burden of proof, Mr. Salmon opened the case for the defendant and called his witnesses first.

Before dealing with the evidence it is desirable that I should deal first with the principle which insists that consent is an essential ingredient of a valid marriage. This principle is one of great antiquity and, indeed, derives from the Roman law, where it was stated in the form nuptias consensus non concubitus facit. This principle was in turn embodied into the canon law of Rome. (See Esmein, *Le Mariage en Droit Canonique* (1891) at p. 97.) The principle was adopted into the English canon law. Ayliffe, in his Parergon, at p. 362, states "the principal thing required to a "legal marriage, is the consent of the parties contracting; which "is sufficient alone to establish such a marriage." In *Turner* v. *Meyers* (orse. *Turner*),[4] Sir William Scott, later Lord Stowell, spoke of consent in marriage in the following terms[5]: "In more

[4] (1808) 1 Hagg.Con. 414.

[5] Ibid. 417.

"modern times it has been considered, in its proper light, as a "civil contract, as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable "persons." Sir John Nicholl in *Countess of Portsmouth* v. *Earl of Portsmouth*,[6] stated the law as follows: "When a "fact of marriage has been regularly solemnized, the presumption "is in its favour; but then it must be solemnized between parties "competent to contract—capable of entering into that most "important engagement, the very essence of which is consent: "and without soundness of mind there can be no legal consent— "none binding in law: insanity vitiates all acts."

Mr. Beyfus, for the plaintiff, argued that the capacity required to make a will was of a higher degree than that required to contract a marriage, and he relied on the direction to the jury given by Sir James Hannen P. in *Boughton* v. *Knight*.[7] Sir James Hannen stated the proposition in the following terms[8]: "Whatever degree of mental soundness is required for any one of these "things—responsibility for crime, capacity to marry, capacity to "contract, capacity to give evidence as a witness.—I must tell "you, without fear of contradiction, that the highest degree of all, "if degrees there be, is required in order to constitute capacity "to make a testamentary disposition. And you will easily see "why. Because it involves a larger and wider survey of facts "and things than any one of those matters to which I have drawn "your attention." Sir James Hannen P. expanded and explained that passage in *Burdett* v. *Thompson*,[9] when he said, speaking of the making of a will, "From the character of the act it requires "the consideration of a larger variety of circumstances than is "required in other acts, for it involves reflection upon the claims "of the several persons who, by nature, or through other circumstances, may be supposed to have claims on the testator's "bounty, and the power of considering these several claims, and "of determining in what proportions the property shall be divided "amongst the claimants; and, therefore, whatever degrees there "may be of soundness of mind, the highest degree must be "required for making a will." I think there is force in Mr. Beyfus' argument and I approach the facts of this case on the basis that a lesser degree of capacity is required to consent to a marriage than in the making of a will. In this case the distinction is of importance since the court has pronounced against the will of

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[6] (1828) 1 Hagg.Ecc. 355, 359.

[7] (1873) L.R. 3 P. & M. 64.

[8] Ibid. 72.

[9] Reported in a footnote to *Boughton* v. *Knight*, ibid. 73.

1953

In the Estate of Park, decd.
Park
v.
Park.

Karminski J.

May 30, 1949, on the ground of the incapacity of the deceased. And May 30, 1949, is the date of the ceremony of marriage the validity of which is in dispute.

I now have to consider what degree of capacity is required to consent to a marriage and further I must inquire into the meaning of consent in relation to the marriage contract. Marriage has been described as a contract and as the most important contract of life, the very essence of which is consent; see *Browning* v. *Reane.*[10] In that case Sir John Nicholl stated[11]: "It is "not material whether the want of consent arises from ideotcy "or lunacy, or from both combined: nor does it seem necessary, "in this case, to enter into any disquisition of what is ideotcy, "and what is lunacy; complete ideotcy, total fatuity from the "birth, rarely occurs; a much more common case is mental "weakness and imbecillity, increased as a person grows up and "advances in age, from various supervening causes, so as to pro- "duce unsoundness of mind. Objects of this sort have occurred "to the observation of most people. If the incapacity be such, "arising from either or both causes, that the party is incapable "of understanding the nature of the contract itself, and "incapable, from mental imbecillity, to take care of his or her "own person and property, such an individual cannot dispose of "her person and property by the matrimonial contract, any more "than by any other contract." Sir James Hannen P. in *Durham* v. *Durham*, said[12]: "The contract of marriage is a very simple "one, which does not require a high degree of intelligence to "comprehend. It is an engagement between a man and a woman "to live together, and love one another as husband and wife, to "the exclusion of all others. This is expanded in the promises "of the marriage ceremony by words having reference to the "natural relations which spring from that engagement, such as "protection on the part of the man, and submission on the part "of the woman. I agree with the Solicitor-General, that a mere "comprehension of the words of the promises exchanged is not "sufficient. The mind of one of the parties may be capable of "understanding the language used, but may yet be affected by "such delusions, or other symptoms of insanity, as may satisfy "the tribunal that there was not a real appreciation of the "engagement apparently entered into." In that case the ceremony of marriage was performed in October, 1882; there was evidence of symptoms of insanity from and after April, 1883, and it was admitted on behalf of the respondent wife that at the time of the hearing of the suit in March, 1885, she was hopelessly insane. A strong body of evidence, including that of two archbishops (one her grandfather), was called to show that the respondent was of apparently sound mind in the period immediately preceding the ceremony of marriage, though she was described as being a lady of no great intellectual powers and exceptionally shy and reserved in her manner. In the result Sir James Hannen P. found on the facts that at the time of the marriage ceremony she was capable of, and did in fact, give her consent to the marriage, and he dismissed the husband's petition. In *Hunter* v. *Edney* (orse. *Hunter*),[13] Sir James Hannen P. had to consider a similar problem but on very different facts. He posed the question for determination in the following terms[14]: "The question which I have to determine is not whether she was "aware that she was going through the ceremony of marriage, "but whether she was capable of understanding the nature of "the contract she was entering into, free from the influence of "morbid delusions upon the subject."

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[10] (1812) 2 Phill.Ecc. 69.

[11] Ibid. 70.

[12] (1885) 10 P.D. 80, 82.

It must be borne in mind, as Sir James Hannen P. reminded himself in *Durham* v. *Durham*,[15] that a mere comprehension of the words of the promises exchanged is not sufficient. The minds of the parties must also be capable of understanding the nature of the contract into which they are entering. The precise nature of that contract may vary with the religious beliefs which the parties practise or profess. Some people may regard marriage as a sacrament; others, while still regarding marriage as a sacred and solemn obligation, do not believe in its sacramental nature. But as Sir James Hannen P. pointed out, the essence of the contract is an engagement between a man and a woman to live together and to love one another as husband and wife to the exclusion of all others. It may be in the present times that submission on the part of the woman is no longer, as it was in 1885, an essential part of the contract. But so far as the husband is concerned there remains the duty to maintain her which is, I think, implicit in what Sir James Hannen P. described as the duty to protect.

In much more recent times, Willmer J. in *In the Estate of Spier, decd.*,[16] stated the proposition in these terms: "There "must be a capacity to understand the nature of the contract

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[13] (1885) 10 P.D. 93.

[14] Ibid. 95.

[15] 10 P.D. 80.

[16] [1947] W.N. 46.

"and the duties and responsibilities which it created, and . . . "there must also be a capacity to take care of his or her own "person and property." I was told that this decision was subsequently reversed by the Court of Appeal on the facts, but that the statement of the law made by Willmer J. was not criticized. The decision of the Court of Appeal is not reported. It is clear, then, that marriage is in its essence a simple contract which any person of either sex of normal intelligence should readily be able to comprehend. I ask myself the question asked in *Hunter* v. *Edney* (orse. *Hunter*)[17] by Sir James Hannen P.: was the deceased capable of understanding the nature of the contract he was entering into?

I now have to consider the facts. The deceased had for many years been engaged in business as a shipping and forwarding agent. It appears that he was highly successful in this business, which in due course became a limited company, and I do not doubt that he had been a man of business shrewdness and acumen. At, or shortly before, the outbreak of war in 1939, he had partly withdrawn from the day-to-day work of the business, but he retained an active interest, visiting the premises of the company almost daily but not spending the whole day there. In January, 1948, his wife, to whom he had been happily married for some 50 years, died. The deceased, who was then aged about 77, was greatly upset by her death and was clearly lonely and depressed. Shortly after his wife's death he made a voyage to South America, no doubt for mental and physical recuperation. On March 1, 1948, he executed a will which is propounded by the defendant in the present action. I have had evidence of the due execution of this will by one of the attesting witnesses; no attack has been made on the capacity of the deceased at that time to execute a will and I find that it was duly executed.

In May, 1948, the deceased suffered a stroke. There can be no doubt that it was a severe stroke and completely incapacitated the deceased for at least two months. The deceased was attended by his regular medical adviser, Dr. Urwick, who called into consultation Dr. Jenner Hoskin. Dr. Hoskin first saw the deceased on June 8 and again on July 25, 1948. Dr. Jenner Hoskin found on examination that the deceased suffered from hardened arteries which, in his view, must have been the cause of his stroke. Dr. Hoskin also found that the deceased suffered from a large heart, a large liver and high blood pressure. Dr. Hoskin saw the

[17] 10 P.D. 93.

deceased again on July 25, 1948, when he found that the effects of the stroke were wearing off, but the heart trouble and hardening of the arteries persisted. So far as his mind was concerned, Dr. Hoskin found that it was impaired and that the deceased was placid and vacant with no memory or interest, but he could get intelligent on past events. Dr. Hoskin's view was that the deceased would be unlikely to achieve a full recovery because even after the immediate effect of the stroke had worn off the underlying condition of hardened arteries was not improved. Dr. Hoskin did not see the deceased after July 25, 1948.

Dr. Urwick saw the deceased very frequently in the weeks immediately following the stroke, and continued to see him regularly until about May 21, 1949. The frequency of Dr. Urwick's visits depended on the condition of the deceased, but he seldom saw the deceased less than two or three times in any one month. Dr. Urwick in the course of his visits found considerable variation in the mental condition of the deceased; sometimes he found him lucid, sometimes confused.

During the time the deceased was at home recovering from this stroke he was visited daily by another witness, Lady Greer. The deceased and his late wife and Lady Greer and her late husband had been close friends for upwards of 50 years. When the deceased lost his wife in January, 1948, Lady Greer was herself already a widow, and no one who heard her evidence could doubt that she was a most devoted and affectionate friend to the deceased and did all she possibly could to alleviate his distress. After the stroke Lady Greer continued to visit the deceased daily, and was therefore an important witness in the sense that she can give a picture of the condition of the deceased over a long period and before and after his stroke.

In August, 1948, the deceased was sufficiently recovered to be able to leave the house and to visit his business. It is quite obvious from the evidence that he showed little interest at that time in the details of his business, though he manifested some concern in the welfare of his staff. His physical condition was weak and he could walk but slowly. I do not think that he had maintained an interest in the details of his business since his partial retirement in 1939, but it is clear from the evidence of some of the witnesses from the business that he was quite incapable of understanding accounts or financial matters even if he had been interested in them. There were called before me several witnesses who had known him well in the business

1953

In the Estate of Park, decd.
Park
v.
Park.

Karminski J.

where they had been employed for many years. Payne, the accountant, tried to interest him in the accounts, but failed. Wilton, the shipping manager, found that the deceased varied in appearance and intelligence from day to day, but found him quite unable to carry on any business conversation. Indeed, Wilton had considerable doubts whether or not the deceased really understood what was being said to him during his visits to the works. Neither Payne nor Wilton thought that the deceased was unfit to contract a marriage, but I do not think that either of them had applied their minds to that question before it was put to them in cross-examination by Mr. Beyfus, nor do I think that either of them had considered the requirements of consent to marriage. The complete lack of interest shown by the deceased in his business after his stroke was corroborated by Turnbull, a witness called on behalf of the plaintiff. Evidence was given by a number of witnesses as to some of the habits of the deceased after his stroke. It is clear that he was often forgetful and untidy. When he visited his business he sometimes forgot to close the door of the lavatory behind him; on other occasions he emerged from the lavatory partially undressed. Much the same signs of forgetfulness were observed in his own flat. He was inclined to forget that he had left taps running; he was forgetful, too, about times of meals. So far as money matters were concerned he was extremely absent-minded; at his club or a hotel he would give money to the cashier or waiter concerned, and trust implicitly in being given the correct change. It is pleasant to observe, that so far as the evidence went, his trust seems never to have been abused. On some occasions he dropped his money or indifferently handed over two or three £1 notes to discharge a debt of a few shillings. Some of these matters were, no doubt, due to physical disabilities attributable to the stroke and to the fact that his eyesight had greatly deteriorated. The fact remains that after he suffered from the stroke he was quite unable to look after his own financial affairs, which were left in the care of Turnbull, who was a fellow-director and a very old friend of the deceased. Turnbull managed the whole of the financial affairs of the deceased and paid his household accounts. In Turnbull's view the deceased did not understand the value of money in the later months of his life.

I now turn to the evidence of Lady Greer, to which I attach great importance, since not only did she have an opportunity of close observation of the deceased over a very long period but, in my view, took full advantage of her opportunities. I thought Lady Greer a most impressive witness; accurate, detached and intelligent. She saw the deceased almost every day between his stroke and his re-marriage. On some occasions she took him away or accompanied him for weekends. She observed that gradually he became more confused and depressed. He sometimes mistook her for his late wife and, indeed, called her by his late wife's name of Beatrice. In the summer of 1948, when he was recovering from the immediate effects of the stroke, Lady Greer accompanied him to Bexhill where the deceased appeared to confuse a maidservant with his late wife. Lady Greer formed the view that the deceased was avid for companionship and, indeed, begged her to come and live at his flat to look after him, offering to marry her if she did so. This offer Lady Greer not unnaturally declined, though it did not abate her daily interest in his welfare. It is right to say that Lady Greer noticed occasionally decided improvements in the mental state of the deceased, and he sometimes spoke to her intelligently enough about golf and, less frequently, about Masonic matters. In general, the life led by the deceased between his stroke in 1948 and his death in 1949 was not perhaps dissimilar to that led by other invalids of his age and station in life. The deceased had been a keen golfer in the past, and liked to talk of golf in retrospect. He was a keen Freemason and liked whenever he could to attend Masonic gatherings and to talk about them. In the late summer of 1948 he sometimes went to Lord's Cricket Ground with his chauffeur-valet to watch the cricket. It appears that soon after his arrival he was usually observed to be asleep, but I cannot attach any particular significance to this fact. Probably his greatest interest was in his life at his club, of which he had long been a member. When he was able to get about after August, 1948, he lunched at his club whenever possible, and very frequently, though less regularly, dined there. In January, 1949, the deceased asked his sister-in-law, Mrs. Nellie Park, to come with her husband (since deceased) to live at his flat and to take charge of his household. It appears that the deceased was not at first able to make Mrs. Nellie Park appreciate what he wanted, but finally he made his meaning plain and Mrs. Park and her husband came to the flat and stayed there until May of 1949. Mrs. Nellie Park gave evidence before me and made it clear that the deceased was eccentric in his habits and very forgetful. In March, 1949, the deceased became ill. Mrs. Park had the impression that he was suffering from a minor stroke. Dr. Urwick, who attended him, did not observe a stroke, but found that he suffered from some kind of spasm brought on probably by gout, which might to a layman simulate a stroke. In any event it is clear that the deceased suffered some physical relapse, and in my view this was accompanied by some degree of mental deterioration. In May, 1949, Mrs. Park observed that the deceased was wandering a great deal at night. He did not seem to want anything, and invariably Mrs. Park took him and put him back to bed. After a few months in the flat of the deceased Mrs. Park was quite worn out and had to seek treatment from Dr. Urwick. In or about mid-May, 1949, the deceased informed Mrs. Nellie Park of his intended marriage and she and her husband left very soon afterwards.

Some light is thrown on the general condition of the deceased by the evidence of Starkey, who had been for a number of years the caretaker at the block of flats at Cornwall Gardens where the deceased lived. Starkey was not fully employed as caretaker but shared that duty with his wife; he was by occupation a bricklayer, but he worked mostly in the neighbourhood of Cornwall Gardens and usually returned home at about noon for his midday meal. Starkey was therefore often about the flats when the deceased left to go to lunch at his club, and there was a period of a few weeks after the deceased suffered from his stroke in 1948 when Starkey was away from work through illness and saw the deceased quite regularly. Prior to his stroke the deceased had very frequently chatted to Starkey when they met, though Starkey noticed that the deceased was very worried and quiet after his wife's death. After the deceased had had his stroke Starkey said that when he spoke to the deceased the latter looked at him vacantly as if he did not understand a word and, indeed, did not appear to recognize him. Starkey was not, in my view, a man with great gifts of verbal expression, but he described by gesture rather than words the demeanour of the deceased and the conversations which took place after his stroke. Starkey said that the deceased looked right through him and up and down and then stood still and vacant. Starkey demonstrated in the box by a piece of natural but convincing acting the vacant look and the rigid position of the body which he observed in the deceased. Starkey added, in homely but striking language, that if his own

1953

In the Estate of Park, decd. Park v. Park.

Karminski J.

father had acted like the deceased he would have got someone to see about his head. In spite of his limitations I thought Starkey was a shrewd observer of the deceased's condition and I regard his evidence, which I accept, as of some general importance.

I come now to the meeting between the plaintiff and the deceased. The plaintiff had for some months before the Easter of 1949 been employed as a cashier in the deceased's club. Up to that time the acquaintance between her and the deceased had been limited to formal matters, though she had, contrary to the custom of the club, completed his meal bills for him. I attach no importance to this fact since after his stroke the deceased's eyesight had suffered and there is no doubt that he found it difficult to write. But on Easter Monday, 1949, he was lunching at the club and was one of the few members there present. After lunch he got into conversation with the plaintiff and they condoled with each other on being alone in a deserted London at Easter. From that time onwards there can be no doubt that the deceased not only formed the intention of marrying the plaintiff but pursued his suit with great persistence. Prior to his Easter conversation with the plaintiff the deceased had been talking generally of re-marriage; he had already asked Lady Greer to marry him, but she had refused; he had spoken of re-marriage also to McGrath, his devoted chauffeur-valet, to whom he was in the habit of speaking on confidential matters. There can in my view be no doubt that from the early part of 1949 the deceased was anxious to have a permanent female companion with whom he was prepared to go through a ceremony of marriage.

On May 7, 1949, the deceased took the plaintiff on a motor drive to Hawkhurst, where they lunched. It is not disputed that on that occasion the plaintiff did most of the talking, though there is evidence that during the lunch at the Hawkhurst Hotel the deceased seemed quite normal. On May 8, the deceased told McGrath that he was going to marry the plaintiff though he had not by then communicated that intention to the plaintiff herself. On May 10, the deceased took the plaintiff for another drive, this time to the Royal Automobile Club's Country Club near Epsom. The deceased appears to have been anxious to conceal from McGrath the fact that the plaintiff worked at his club, and described her as a lady who was a friend of another friend of his. Indeed, when McGrath was sent to fetch the plaintiff or to take her back he was ordered to wait at a point near the club and not at the club itself. I do not think that McGrath was deceived, since the deceased on one occasion between the two drives asked him to telephone the plaintiff at the club.

On the drive to Epsom the deceased proposed marriage to the plaintiff soon after the commencement of the drive. The car was a saloon, so that the proposal was inevitably overheard by McGrath. The proposal was a complete surprise to the plaintiff, who told the deceased that she would require time to consider the matter and refused to give him an answer there and then. At this stage the plaintiff hardly knew the deceased, so that any hesitation on her part seems perfectly natural.

One of the matters which concerned the plaintiff was her financial position. She was at that time in good employment and was not anxious to give up that employment to be the wife of a man about whose financial position she knew nothing. She was therefore anxious that her financial position should be safeguarded, and preferably secured, by some kind of settlement. The deceased therefore took her to see his solicitor, Culross. I understand that the deceased had told Culross of his proposed marriage to the plaintiff a few days before this meeting, but Culross was not called as a witness before me by either side and I therefore find it difficult to fit him accurately into the pattern of events. But this, at any rate, appears to be beyond dispute, namely, that on May 13 the plaintiff accepted the deceased as her fiancé and that he then gave her a ring. On May 14 the deceased gave the plaintiff £500. On May 16 the deceased told Turnbull, his business colleague, of his intended marriage to the plaintiff. On May 18 there was a further meeting at Culross' office to discuss the proposed settlement. At that meeting, at which Turnbull was present, the initiative seems to have been shared between Culross and Turnbull. Turnbull's role was to inform Culross as to the details of the financial position of the deceased and this he did. The deceased himself seems to have taken small interest in the discussion, but Turnbull thinks that he understood generally what was being discussed. At any rate, it was decided to settle by way of ante-nuptial settlement for the benefit of the plaintiff during her life sufficient preference shares in the deceased's company to provide a gross annual income of £300. That same night the deceased was present at a Masonic function, and during dinner sat next to his friend and dental surgeon, Campkin, who had known him professionally and personally for some years. Campkin had last seen the deceased on April 21, 1949, when he had treated his teeth and found him quite sensible. At the dinner on May 18, 1949, Campkin found the deceased very cheerful about his intended marriage and very happy about the prospects of his future life with the plaintiff. Campkin, whom I regarded as a shrewd and trained observer, expressed the view that some of the deceased's cheerfulness was due to alcohol and that he had been celebrating his engagement with some success prior to dinner. But apart from some degree of exhilaration, Campkin found nothing abnormal in the mental processes of the deceased at that time.

At some stage subsequent to May 13 the plaintiff had made it clear to the deceased that the marriage was to be one free from any sexual relations between them. On this she insisted and the deceased concurred, though possibly reluctantly, in abstaining from sexual intercourse with his intended wife. In fact no sexual relations ever occurred between the parties either before or after the ceremony of marriage; nor did they after the ceremony of marriage share a common bedroom.

On about May 20 the deceased went to stay at an hotel at Bexhill and remained there until May 26. While at Bexhill he saw Dr. Urwick, who was staying at his own house in the neighbourhood. He told Dr. Urwick that he was thinking of marrying, though he did not tell Dr. Urwick that he was engaged to the plaintiff. Dr. Urwick had attended the deceased as his medical adviser from January, 1948. With his knowledge of the physical and mental condition of the deceased Dr. Urwick advised strongly against marriage, but the deceased was quite adamant in his determination to get married. Looking at the history of the matter no one could for a moment doubt the propriety of Dr. Urwick's advice; but I have to remind myself here that I am considering the question not of the wisdom of the deceased's marriage in general or his marriage to the plaintiff in particular, but of his capacity to marry. Dr. Urwick had observed of the deceased after his stroke that he was confused at times but lucid at others, and in his lucid moments the deceased would converse quite satisfactorily and would give lucid replies to questions. Dr. Urwick observed also that the deceased appeared happier after he had met the plaintiff and was less morose and depressed than he had been. In particular, Dr. Urwick thought that at Bexhill the deceased was treating the subject of marriage intelligently, saying that he wanted companionship and was lonely.

Another witness, Miss Lee-Roberts, speaks to the improvement observed by her in the deceased's condition during his Bexhill visit in May of 1949. Miss Lee-Roberts had known the deceased well for a good many years, her parents having been close friends of his. The deceased had been a frequent visitor to Bexhill after his wife's death and Miss Lee-Roberts observed that after his stroke his talk was disconnected and he was very miserable. But during his subsequent visits she noticed a gradual, if not remarkable, improvement. During his last visit in May, 1949, the deceased told Miss Lee-Roberts that he was going to marry a very charming lady; he was excited and much more cheerful, in good spirits and, as Miss Lee-Roberts described it, much more interesting to talk to. I thought Miss Lee-Roberts a careful and accurate witness, giving me a dispassionate account of what she had observed in an old friend.

On May 26 the deceased returned to his flat and at about the same time the plaintiff joined him there. They occupied separate bedrooms, but the deceased frequently came into the plaintiff's bedroom during the night and embraced and fondled her in an amorous manner. These advances the plaintiff rejected, and the deceased observed that he thought he was already married to her. The plaintiff now says that the deceased stated that he regarded his engagement to her as as good as marriage. This explanation was not given to the jury in the former action and I am inclined to regard it as an afterthought by the plaintiff. I believe that the true position was that the deceased at this time was both amorous and confused; he was attracted physically by the plaintiff and there were times when I think that he quite genuinely forgot that the marriage had not yet taken place. I do not find that these periods of confusion were continuous.

On May 28 the ante-nuptial settlement which had already been discussed was executed by the deceased. There is no doubt that on that day the deceased was confused and had little, if any, knowledge of what was taking place. It is clear that he had little knowledge of what property he was in fact settling, nor had he any clear idea of the meaning of the transaction in which he was taking a vital part as settlor. Indeed, Mr. Turnbull, giving evidence on behalf of the plaintiff, expressed the view that the deceased was not fit to marry on that day.

On May 29 the deceased on rising in the morning thought that the wedding was taking place that day and had to be told by McGrath that the wedding was in fact fixed for the next day. The deceased seems at this stage to have been somewhat confused as to dates, believing that he had committed himself to a luncheon engagement with Ludlow, a friend of his, on the next day, May 30. There was some evidence that in general the deceased was not at his best when he woke up in the mornings or indeed for some time afterwards. McGrath says that it was the custom of the deceased to drink a gin about 11 a.m. and that this drink cleared his head. Dr. Urwick was somewhat doubtful about the effect of alcohol on the deceased, since he felt that while a small amount of alcohol would stimulate the circulation and the intelligence of the deceased, a larger amount would only confuse him. There was no precise evidence as to the quantity drunk by the deceased in the mornings, but on the whole I have come to the conclusion that his mental state tended to improve during the forenoon; though, as Dr. Urwick pointed out, the deceased might get tired during the course of the day and that his intelligence would then deteriorate.

I turn now to May 30, 1949, the vital day in this case, since it was the day on which the ceremony of marriage was performed. I use the word " vital " deliberately, since I have to deal with the capacity and intelligence of the deceased on that day and not on any other, though I must, of course, give full consideration to his mental state at times before and after May 30. The marriage ceremony which had been arranged by the plaintiff was to take place at the Kensington register office at 11.30 a.m. It had been decided to give a small party after the ceremony at the flat of the deceased. Both the deceased and the plaintiff rose at about 4 a.m. to prepare the flat for the party. I have no doubt at all that for the first few hours of that day the deceased thought that he was already married to the plaintiff and had been married to her since May 26. On earlier occasions the deceased had indicated to the plaintiff that he had thought he was married to her on May 13, the day of their engagement.

One of the difficulties on this stage of the case lies in the fact that I found the plaintiff to be a thoroughly unsatisfactory witness. In the former trial she had relied on the mental confusion of the deceased in May, 1949, as evidence against his testamentary capacity to make a will on May 30, and I think that she was very sensible of some of the difficulties on her side in the present case caused by that evidence. In the result, I found her sometimes lacking in candour and more frequently quite unintelligible. I have therefore felt it right to place very little reliance on her evidence in the present case where it differs from that given by her in the former.

1953

In the Estate of Park, decd.
Park
v.
Park.

Karminski J.

In due course the deceased, properly dressed in a morning coat, went to the register office for the marriage ceremony. Weston, the superintendent registrar, stated that he noticed nothing abnormal about the deceased, who conducted himself during the ceremony with perfect propriety and appeared to understand it. After the ceremony Weston congratulated the deceased, who seemed very happy. Weston has, in the course of his duties, married a great many couples and was not unaccustomed to performing the ceremony for those of the age of the deceased. In the present case Weston was invited to attend the reception and was able to accept, so that he had a somewhat greater opportunity of observing the parties to the marriage than was usually afforded to him. The evidence of Weston is of course of importance so far as it goes; namely, that he observed nothing in the deceased to arouse any suspicions as to his capacity. Weston was unaware at that time of the earlier history of the deceased, and inevitably the importance of his evidence is limited by that fact.

After the ceremony of marriage the deceased and the plaintiff returned to his flat. There a small reception was held at which a number of friends and relations were present, champagne was provided and the usual toasts were drunk. The deceased then retired with the intention of executing a new will; he signed it and it was duly witnessed in accordance with the provisions of the Wills Act, but this court has already pronounced against that will on the ground of the testamentary incapacity of the deceased. The deceased then returned to the reception in what appeared to be a cheerful and happy mood, but soon became physically tired and at about 3 p.m. retired to bed. He made one brief reappearance partially dressed and retired to bed again. He told the plaintiff nothing of the will which he purported to execute on the day of his wedding.

The rest of the story can be told very briefly since the deceased died on June 17, 1949. During the short period between the ceremony of marriage and his death his moods and conduct seemed to have varied. The plaintiff said that he behaved to her like a foolish schoolboy and would not let her out of his sight. But Dr. Urwick told us that on June 7 he saw the deceased, who told him that he was disappointed in the marriage and that it had not been consummated.

The evidence in this case is at many points conflicting, and the conflict has not been made easier to resolve because it has come (apart from that of the plaintiff) from witnesses whom I have regarded as reliable and truthful. In my view the conflicting nature of the evidence can be largely explained by the fact that from the summer of 1948 until his death in June, 1949, the condition of the deceased varied from day to day and sometimes, as Dr. Urwick found, almost from hour to hour. It is important to recognize that the deceased was a man who had been of good business and general intelligence, able to build up and to direct a successful trading company. This is certainly not a case where a man has from birth been deprived of the usual intellectual faculties or had been in any sense mentally deficient. The deceased himself appears to have recognized the change which came over his faculties after his stroke and to have been aware of his own disabilities. During their brief courtship he told the plaintiff, and this part of her evidence I accept, that sometimes a shutter appeared to come over his brain and that he then could no longer remember. From the evidence of his business associates I draw the inference that he was quite intelligent when interested in matters such as staff welfare; but when confronted with matters in which he was no longer interested, such as accounts, he became easily bored and tired and would then no longer trouble to make any further intellectual effort.

It is clear that at times in the weeks immediately preceding the ceremony of marriage the deceased was confused in that he considered himself already married to the plaintiff. On the other hand, it is equally clear that he pursued his courtship of the plaintiff with persistence and, indeed, with some degree of craft. He was obviously proud of his achievement in winning the plaintiff's consent to his proposal of marriage. In this he was, I think, actuated first and foremost by his desire to escape from the loneliness which had afflicted him since the death of his wife. His determination to go through with the marriage was made clear by him to those around him, especially to McGrath, and to Dr. Urwick who had opposed it.

In the course of his argument Mr. Salmon accepted that no high intellectual standard was required in consenting to a marriage; he further accepted that the burden was on him to prove the invalidity of a marriage in form properly celebrated. If he has failed to discharge that burden of proof then the plaintiff must succeed. But I prefer in this case to answer the question posed to himself by Sir James Hannen in *Hunter* v. *Edney* (orse. *Hunter*)[18]: was the deceased capable of understanding the nature of the contract he was entering into, free from the influence of morbid delusions on the subject? It is not an easy question in this case to answer: I have had to consider carefully the manifest mental weaknesses and confusions of the the deceased on the one hand, and his pertinacity and determination with regard to the marriage on the other. I have come to the conclusion that he could and did understand the nature of the contract he was entering into, and I find that the ceremony of marriage in fact performed on May 30, 1949, between the deceased and the plaintiff constituted a valid and binding marriage between them. In the result it must follow that the will of March 1, 1948, was revoked by the marriage between the deceased and the plaintiff, and I pronounce against that will and find that the deceased died intestate.

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[18] 10 P.D. 93, 95.

Judgment for plaintiff.

Solicitors: *Ager & Ager; Lewis W. Taylor & Co.; Bertram White & Co.; Waterhouse & Co.; Pritchard, Englefield & Co. for Boote, Edgar & Co., Manchester.*

J. B. G.

C. A.

1953
Oct. 27, 28, 29, 30;
Nov. 2.

Singleton, Birkett and Hodson L.JJ.

In the Estate of PARK, decd. PARK v. PARK.

[1951 P. No. 1348.]

Husband and Wife—Marriage—Capacity to enter into marriage contract—Requisites—Previous probate action—Jury's finding that deceased mentally incapable of executing will made on marriage day not binding on court considering mental capacity to marry.

The defendant in this probate action sought to establish that the deceased was at the time of his marriage to the plaintiff incapable of appreciating the nature of the marriage contract, and the duties and responsibilities which it created, and that accordingly there was no consent to the marriage; and he asked the court to declare the marriage null and void and to pronounce in solemn form for a will executed before the ceremony. The plaintiff, the widow of the deceased, sought to have that will pronounced against, alleging that it had been revoked by marriage; and she claimed that the deceased had died intestate.

In a previous probate action (The Times, December 2, 1950), in which the present plaintiff was the defendant and the present defendant adopted the pleadings of the plaintiffs, the present plaintiff had succeeded in having an alleged will of the deceased, which purported to have been executed a few hours after the marriage ceremony, pronounced against on the ground that the deceased was

C. A.

1953

In the Estate of Park, decd.
Park
v.
Park.

not of sound mind, memory and understanding and that he did not know and approve of the contents of the will.

Karminski J. held that the marriage was valid, and that, since the will executed before the marriage was thereby revoked, the deceased died intestate.

On appeal by the defendant:—

Held, that the trial judge, on the evidence before him, had applied the correct tests and drawn the correct inferences in deciding that the deceased had been capable of understanding the nature of the contract into which he was entering, and the responsibilities normally involved in that contract, free from the influence of morbid delusions on the subject; and that the marriage was accordingly valid.

Dictum of Karminski J. that a lesser degree of capacity is required to consent to a marriage than in the making of a will, ante, p. 97, disapproved.

Decision of Karminski J., ante, p. 89, affirmed.

Appeal from Karminski J.

[The facts and the evidence are fully stated in the judgment of Karminski J., at pp. 100 et seq., ante.]

The plaintiff, Mrs. Wyn Blodwen Park, claimed as the lawful widow and one of the persons entitled in the event of an intestacy to share in the estate of Robert John Charles Park, who died on June 17, 1949, to have an alleged will of the deceased dated March 1, 1948, pronounced against and to have a grant of letters of administration of the estate of the deceased. The defendant, Peter Park, was the principal residuary legatee under the will of March 1, 1948, under which the plaintiff took no interest.

The deceased, then 78 years of age, had gone through a ceremony of marriage with the plaintiff at the register office, Kensington, on May 30, 1949. Later on the day of the ceremony the deceased purported to execute an elaborate will, by which the plaintiff would have benefited to a relatively modest extent in his estate, which was stated to exceed at least £120,000.

On December 1, 1950, in a probate action before a jury (*In re Park; Culross* v. *Park*, The Times, December 2, 1950), in which the executors of the will of May 30, 1949, were the plaintiffs (the present defendant and his brother adopting their pleadings) and in which the present plaintiff, Mrs. Park, was the defendant, the jury found that at the time when the will was executed the deceased was not of sound mind, memory and understanding, and that he did not know and approve of the contents of the will. Pearce J. accordingly pronounced against the will.

In the present action the defendant alleged by his defence that at the time of the ceremony of marriage on May 30, 1949, the

C. A.
1953

In the Estate of Park, decd.
Park
v.
Park.

deceased "was of unsound mind and mentally incapable of "appreciating the nature of the marriage contract and the duties "and responsibilities which it creates, and that in the premises "there was no consent by the deceased to the marriage, and the "said ceremony was a nullity." It was alleged that the deceased suffered from serious depression after the death of his former wife, to whom he had been married for some 50 years, in January, 1948, and that after a stroke in May, 1948, "he lost his grip on "personal and business affairs and rapidly fell into a state of "senility and second childhood, rendering him incapable of sound "judgment on any serious matters affecting his life and interests."

The defendant claimed a declaration of nullity of the marriage in fact celebrated and asked the court to pronounce for the will of March 1, 1948, in solemn form.

The plaintiff denied that the deceased was not capable of appreciating the nature of the marriage contract and the duties and responsibilities which it created, and denied that there was no consent and that the ceremony was a nullity. She contended that the defendant was estopped from alleging that the plaintiff was not the lawful widow of the deceased, on the ground that he had sued the present plaintiff in the 1950 probate action as the lawful widow of the deceased, and that the validity of the will of May 30, 1949, was litigated in the action upon the basis that the present plaintiff was the lawful widow of the deceased, and that the court, after pronouncing against the will, had ordered that she should be paid her costs of the action (other than on an issue of undue influence) out of the estate, upon that basis.

She further contended that the will of March 1, 1948, had been revoked by the marriage of May 30, 1949. Karminski J. held on the evidence that the marriage was valid and that since the will executed before the marriage was thereby revoked, the deceased died intestate.

The defendant appealed.

Cyril Salmon Q.C., *John B. Latey* and *Helen Shore* for the defendant. Karminski J. found that the deceased was mentally capable on May 30, 1949, of contracting a valid marriage. Yet in the earlier probate action the present plaintiff had successfully attacked the will made a few hours later on the ground that at the time the deceased was not of sound mind, memory and understanding. That there should be two conflicting findings in two sets of proceedings is inconsistent, and the decisions are difficult to reconcile.

The requisites for making a valid marriage are: (1) the parties must understand the nature of the marriage contract, see *per* Shearman J. in *Baldwin* v. *Baldwin* [1] on the word "understand" in relation to the real nature of the marriage contract; (2) they must understand the rights and responsibilities that the marriage creates; (3) each party must be able to take care of his or her own property and person, see *per* Sir John Nicholl in *Browning* v. *Reane*,[2] where marriage is described as "the most important "contract of life"; (4) if either party lacks any of the above attributes, it is not enough that he or she should appreciate that they were taking part in a marriage ceremony or understand its words, see *per* Sir James Hannen P. in *Durham* v. *Durham*,[3] who said that though the marriage contract was simple a man of unsound mind could not contract. That case raised the question whether there are different standards of mental capacity for making a will and contracting marriage, and the President implied that the standards are much the same. In *Forster* (orse. *Street*) v. *Forster* [4] it was held that though a man knew that he was going through the marriage ceremony, his mental life was so unreal that he could not enter into a valid marriage. In *Jackson* (orse. *Macfarlane*) v. *Jackson* [5] Bargrave Deane J. adopted the same test as Sir James Hannen P. in *Hunter* v. *Edney* (orse. *Hunter*) [6] as to the need to understand the contract, free from the influence of morbid delusions, and Karminski J. followed that. The deceased in the present case, though he would have said, if asked what he wanted to do, "I want to get married," and was able to repeat the words of the registrar, did not know what the contract of marriage involved.

Karminski J. said that a lesser degree of capacity is required to consent to a marriage than to make a will; but where the soundness of mind relied on is senility, as here, exactly the same standard is required for both. The judge approached the case on the basis that a different standard is required, citing *Boughton* v. *Knight* [7] and the note to that case in *Burdett* v. *Thompson*.[8] It is submitted that he misunderstood the effect of those cases. There are not two standards; his judgment was coloured by his wrong approach and should not be allowed to stand. [*Cole* v.

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[1] The Times, July 30–1, 1919.

[2] (1812) 2 Phill.Ecc. 69, 70.

[3] (1885) 10 P.D. 80, 81.

[4] (1923) 39 T.L.R. 658, 661.

[5] [1908] P. 308, 310.

[6] (1881) 10 P.D. 93, 95.

[7] (1873) L.R. 3 P. & M. 64, 67.

[8] (1873) L.R. 3 P. & M. 71–2n.

C. A.
1953

IN THE ESTATE OF PARK, DECD.
PARK
v.
PARK.

Cole,[9] *In the Estate of Spier, decd.*,[10] and *Park* v. *Park*[11] were also referred to.]

Gilbert Beyfus Q.C. and *C. A. Marshall-Reynolds* for the plaintiff. The only issue is whether there are grounds on which Karminski J.'s judgment finding that the defendant had not discharged the onus of establishing that the deceased was disabled by mental capacity from giving the necessary consent can be reversed; that can only be done by showing (1) that the judge erred in law; (2) that he erred in assessing the evidence; (3) that he drew wrong inferences from the evidence.

The question before the jury in a probate action is the capacity to make a particular will. It is not admitted that the standard of intelligence or soundness of mind is the same for the making of all wills as for getting married. Karminski J. considered whether there were different standards; but it is irrelevant whether he was right or wrong in his conclusion that a lesser and normally lower standard was required for marriage, for he went on to consider properly the law as to mental capacity to marry, and decided that question on the totality of the evidence he accepted. This court cannot say that the inferences which he drew were wrong.

In most of the authorities on lack of testamentary capacity the person concerned was diseased in mind. Here, however, the deceased's understanding was clear; his incapacity resulted from failure of the supply of blood to the brain at certain times, but when he was interested in anything there was no such failure and he was then alert and capable of understanding. He was vitally interested in this marriage from the moment he decided on it, and what the judge had to consider, and did consider, was his state of mind on one of his good days and not on one of his bad days. Karminski J. considered carefully the medical evidence as to the deceased's degree of mental capacity, which was said to vary almost from hour to hour.

It would be contrary to public interest to put too high the standard of mental capacity required for a valid marriage, and particularly dangerous to accept as one of the requisites the capacity to take care of one's own property. Such capacity is often absent in marriages which are quite clearly valid, as, for example, deathbed marriages or the marriage of a wealthy ward in Chancery under age. If a man is married before a registrar in the presence of solicitors, business associates and relatives, and a court is to hold that such a marriage is invalid because at some time the man was in an unfit mental state, that would make the task of registrars impossible. The words of Sir James Hannen P. in *Durham* v. *Durham*,[12] that the contract of marriage is "an "engagement to live together and love one another to the exclu- "sion of all others," and does not require a high degree of intelligence to comprehend, are to be preferred to the test in *Cole* v. *Cole*,[13] which uses the unhappy word "discretion" in relation to the use of property. Karminski J. put the right test: Was the deceased capable of understanding the contract free from morbid delusions on the subject?

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[9] (1857) 5 Sneed's Tennessee Rep. 56.

[10] [1947] W.N. 46.

[11] 1914 S.L.T. (O.H.) 88.

Finally, it is submitted that the trial judge and this court should only have regard to the finding of the jury in the probate action to the extent to which a tribunal in a criminal action is entitled to pay attention to "previous convictions," that is, such attention as it thinks fit. If the finding of the jury had been on precisely the same issue as in the present action, it would have been quite improper for the judge here to have paid attention to it in considering the mental capacity of the deceased; but it was on a different issue, based on different evidence, and with a different onus of proof; it is conceded, however, that the judge was entitled to have regard to that finding in so far as it could have any bearing on the credibility of the witnesses before him, and that is what he did.

Salmon Q.C., in reply, cited *Turner* v. *Meyers* (orse. *Turner*).[14]

Salmon Q.C., *John Latey* and *R. T. Barnard* for certain parties cited.

November 2. Singleton L.J. stated the facts, read from the pleadings in the probate action, and said that those were some of the allegations made by the plaintiff in the suit now before the court as to the condition of the deceased; the onus was on those putting forward the second will, and the answers of the jury meant that they were not satisfied on the evidence that the deceased at about a quarter to 3 on May 30, 1949, was of sound mind, memory and understanding. His Lordship referred to the pleadings in the second action and continued:—If the plaintiff succeeds, the marriage revoked the will of 1948 and there is an intestacy. No one interested under the will remains in the fight except Peter Langley Park, and he defended as, and is appealing as, an assisted person.

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[12] 10 P.D. 80, 81.

[13] 5 Sneed's Tennessee Rep. 56.

[14] (1808) 1 Hagg.Con. 414.

One can well appreciate the difficulties of the solicitors and others who were interested under both wills. They sought to propound the will of 1949. The jury decided against that. It would be difficult for the solicitors now to say that the deceased was not fit to get married on the same day. No one suggested at the time that the deceased was not fit to get married. The defendant in the present proceedings gave evidence in the first action in support of the will. He did not give evidence in this action.

It was submitted by Mr. Salmon, for the defendant, that Karminski J. approached the case on the wrong basis. Mr. Salmon put before the court these propositions: To make a valid marriage, (1) the parties must understand the nature of the marriage contract; (2) the parties must understand the rights and responsibilities which marriage entails; (3) each party must be able to take care of his or her person and property; (4) it is not enough that the party appreciates that he is taking part in a marriage ceremony or that he should be able merely to follow the words of the ceremony; if he lacks that which is involved under heads (1), (2) and (3) the marriage is invalid.

Mr. Latey, who followed, put the case in this way: No doubt the deceased intended to marry the plaintiff. A person of unsound mind may form such an intention. The question for consideration is whether he sanely comprehended the nature of the marriage contract.

It was further submitted that the case ought not to be left in the way in which it stands. There is the verdict of a jury that the deceased was of unsound mind on May 30, and the judgment of a judge that he was fit to marry on the same day. There was no evidence of any change in the condition of the deceased between the time of the marriage ceremony and the making of the will, and it was claimed that if the defendant was not entitled to succeed, at least there ought to be a new trial.

Mr. Beyfus, for the plaintiff, agreed that on the evidence given in the court below there was nothing to show any difference in the state of the deceased's mental condition between 11 o'clock that morning and a quarter to 3 in the afternoon. He submitted that the judgment of Karminski J. was right on the evidence and that this court ought not to interfere. He said that, as a matter of law, Karminski J. ought not to have paid any attention to the fact of the jury's finding of incapacity, and that this court ought not to have regard to the jury's verdict. At a later stage he withdrew from that proposition to some extent.

It seems to me impossible for the judge in the present case to close his eyes to the findings of the jury in the earlier case. He is not bound by them. He must make up his mind on the evidence given before him. At the same time, much of the evidence given before the jury was read on this trial, and in particular a considerable part of the evidence of the plaintiff herself.

[His Lordship referred to the evidence of three witnesses who supported the case of the defendant that the deceased was not in a fit condition to marry on May 30, 1949, and continued:] Perhaps the strongest evidence came from the plaintiff herself. When she gave her evidence on the first trial she was, of course, seeking to upset the will which was made a few hours after she had married the deceased. [His Lordship then cited passages from the plaintiff's evidence before Pearce J. and continued:—] Karminski J. described the plaintiff as a thoroughly unsatisfactory witness. He said that he ought not to accept her evidence given on the second trial where it differed from that given on the first trial. He did not say how much of her evidence he accepted in fact.

If the evidence to which I have referred of those three witnesses and of the plaintiff herself be accepted, and if it stood alone, one would think that there would be every reason for saying that the deceased was not mentally fit to be married on May 30, 1949. It is necessary, however, to look at another side of the picture.

[His Lordship considered further portions of the evidence, in particular that of McGrath, the chauffeur-valet, who described the following incident on the morning of the marriage ceremony. " Just before we left for the church, he (the deceased) told me to " fetch Mr. Turnbull " (a fellow director and an old friend) " into " the bedroom and there were three glasses, and he poured us " out a drop of his brandy each for his health, and then he went " over to a photograph [of his first wife] and said: ' To the most " ' beautiful girl in the world,' and he said: ' Whatever happens " ' nobody will ever take your place.' " His Lordship continued:—]

That was a striking incident, and it would appear that at that moment, at least, the deceased realized that he was contemplating marriage.

[After considering further portions of the evidence, his Lordship said:—] There is no doubt that there was evidence both ways, which is most admirably dealt with in the judgment

C. A.
1953

IN THE ESTATE OF PARK, DECD.
PARK
v.
PARK.

Singleton L.J.

of Karminski J.[1] It is striking that, so far as the evidence shows, no one ever suggested before the deceased died that he was mentally unfit to marry. A brother and his wife, and the solicitor and his wife were present at the wedding, and directors were present, too. It would be difficult for the solicitor to say that the deceased was not fit to get married when he, the solicitor, drew up the settlement which was executed on May 28, and also drafted the will which was signed on May 30. There were numerous relations, but not one of them raised any question at the time, so far as we know from the evidence.

Karminski J., in the course of his judgment, said [2]: "I think "there is force in Mr. Beyfus' argument and I approach the "facts of this case on the basis that a lesser degree of capacity "is required to consent to a marriage than in the making of a "will."

That appears to have been based on passages in the summing-up of Sir James Hannen P. to a jury in *Boughton* v. *Knight*.[3] That was a will case, and Sir James Hannen P. is reported as saying [4]: "Some years ago the question of what amount of "mental capacity was required to make a man responsible for "crime was considered in *M'Naghten's* case.[5] No doubt the "question is treated somewhat differently in a criminal suit to "what it is here (the difference I will explain presently); but "there is, as you will easily see, an analogy between the cases "which will be of use to us in considering the points before us. "Lord Chief Justice Tindal, in expressing the opinion of all the "judges, said—'In all cases every man is to be presumed to be "'sane until the contrary is proved, and it must be clearly "'proved, that at the time of committing or executing the act "'the party was labouring under such defect of reason from "'disease of the mind as not to know the nature and quality of "'the act he was doing; or if he did know it, that he did not "'know he was doing what was wrong.' That, in my opinion, "affords as nearly as possible a general formula which is applicable in all cases in which the question arises, not exactly, "perhaps, in the terms I have read, but to the extent I will "explain to you. It is essential, to constitute responsibility for "crime, that a man shall understand the nature and quality of "the thing he is doing, or that he shall be able to distinguish in "the act he is doing right from wrong. Now a very small degree

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[1] Ante, 95.
[2] Ante, 97.
[3] (1873) L.R. 3 P. & M. 64.
[4] Ibid. 71, 72.
[5] (1843) 10 Cl. & F. 200.

C. A.
1953

In the Estate of Park, decd.
Park
v.
Park.

Singleton L.J.

"of intelligence is sufficient to enable a man to judge of the "quality and nature of the act, and whether he is doing right or "wrong, when he kills another man; accordingly he is responsible "for the crime committed if he possesses that amount of intelli"gence. And so in reference to all other concerns of life,—was "the man at the time the act was done of sufficient capacity to "understand the nature of the act? Take the question of "marriage. It is always left in precisely the same terms as I "have to suggest in this case. If the validity of a marriage be "disputed on the ground that one or other of the parties was of "unsound mind the question will be, was he or she capable of "understanding the nature of the contract which he or she had "entered into? The same will occur in regard to contracts of "selling and buying. Again, take the case suggested by counsel, "of a man, who, being confined in a lunatic asylum, is called "upon to give evidence. First, the judge will have to consider, "was he capable of understanding the nature and character of "the act that he was called upon to do, when he was sworn to "speak the truth? Was he capable of understanding the nature "of the obligation imposed upon him by that oath? If so, then "he was of sufficient capacity to give evidence as a witness. "But, gentlemen, whatever degree of mental soundness is "required for any one of these things,—responsibility for crime, "capacity to marry, capacity to contract, capacity to give "evidence as a witness,—I must tell you, without fear of con"tradiction, that the highest degree of all, if degrees there be, is "required in order to constitute capacity to make a testamentary "disposition. And you will easily see why. Because it involves "a larger and wider survey of facts and things than any one of "those matters to which I have drawn your attention."

In a later case (*Burdett* v. *Thompson*[6]) reported in a footnote to that report, Sir James Hannen, in directing a jury, said: "It "has been erroneously supposed that I said that it requires a "greater degree of soundness of mind to make a will than to "do any other act. I never said and I never meant to say so. "What I have said, and I repeat it, is, that if you are at liberty "to draw distinctions between various degrees of soundness of "mind, then, whatever is the highest degree of soundness is "required to make a will. That is very different from the pro"position that it requires a higher degree of soundness of mind "to make a will than to do anything else."

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[6] (1873) L.R. 3 P. & M. 72n.

C. A.
1953

In the Estate of Park, decd.
Park
v.
Park.

Singleton L.J.

I do not think that any good purpose is served by seeking to draw any such distinction, nor do I believe that there is one. If a man's mental condition is such that he is not capable of making a simple will: "I leave all of which I stand possessed "to my wife," or, "I give and bequeath all my property of "whatever nature equally between my children," most people would consider that he is not in a fit condition to enter into a contract of marriage. Further considerations may well arise when a complicated testamentary document is propounded, and it must not be overlooked that in such a case there is the question whether the testator knew and approved the contents of the will.

In *Browning* v. *Reane*,[7] administration of the effects of a wife was refused to the husband on the ground that his marriage had been illegally contracted and nullity of marriage was established. Sir John Nicholl said [8]: "Here then the law, and the good sense "of the law, are clearly laid down; want of reason must, of "course, invalidate a contract, and the most important contract "of life, the very essence of which is consent. It is not material "whether the want of consent arises from ideotcy or lunacy, or "from both combined: nor does it seem necessary, in this case, "to enter into any disquisition of what is ideotcy, and what is "lunacy; complete ideotcy, total fatuity from the birth, rarely "occurs; a much more common case is mental weakness and "imbecillity, increased as a person grows up and advances in "age, from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the "observation of most people. If the incapacity be such, arising "from either or both causes, that the party is incapable of "understanding the nature of the contract itself, and incapable, "from mental imbecillity, to take care of his or her own person "and property, such an individual cannot dispose of her person "and property by the matrimonial contract, any more than by "any other contract. The exact line of separation between "reason and incapacity may be difficult to be found and marked "out in the abstract; though it may not be difficult, in most "cases, to decide upon the result of the circumstances; and this "appears to be a case of that description, the circumstances being "such as to leave no doubt upon my mind." It will be observed that Sir John Nicholl put as a test "and incapable, from mental "imbecillity, to take care of his or her own person and property." It must depend, of course, on the degree of mental imbecility;

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[7] (1812) 2 Phill.Ecc. 69.

[8] Ibid. 70.

C. A.
1953

In the Estate of Park, decd.
Park
v.
Park.

Singleton L.J.

a person may be slovenly or wildly extravagant, but still capable of entering into a contract of marriage.

In *Durham* v. *Durham*,[9] the petitioner sought a declaration of nullity of his marriage on the ground that at the time of the celebration of the marriage his wife was of unsound mind and incapable of contracting marriage. Sir James Hannen P. said [10]: "All the authorities bearing on the subject have been brought to my notice, but I do not think it necessary to review them, as I am of opinion that every case of this kind must be decided upon its own facts. Nor do I consider that it would be useful to borrow from my predecessors, or to attempt myself to form any exact definition of what constitutes soundness of mind. I accept for the purposes of this case the definition which has been substantially agreed upon by the counsel to whom I have to express my obligations for the very able assistance they have given me, namely, a capacity to understand the nature of the contract, and the duties and responsibilities which it creates. It is to be observed, however, that this only conceals for a moment the difficulties of the inquiry, for I have still to determine the meaning to be attached to the word 'understand.' If I were to attempt to analyze this expression, I should encounter the same difficulties at some other stage of the investigation with reference to some other phrase, and I should still have to determine, on a review of the whole facts, whether the respondent came up to the standard of sanity which I must fix in my own mind, though I may not be able to express it. I may say this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman. I agree with the Solicitor-General, that a mere comprehension of the words of the promises exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into."

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[9] (1885) 10 P.D. 80.

[10] Ibid. 81.

In a similar case, *Hunter* v. *Edney* (orse. *Hunter*),[11] reported in the same volume, though decided some years earlier, the President said[12]: "The question which I have to determine is "not whether she was aware that she was going through the "ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free "from the influence of morbid delusions upon the subject."

In *Jackson* (orse. *Macfarlane*) v. *Jackson*,[13] Bargrave Deane J. adopted that which Sir James Hannen P. had said in *Hunter* v. *Edney* (orse. *Hunter*),[14] and he added[15]: "Those words are "short, concise, and clear, and I think I may fairly use them in "applying my mind to the particular facts of the present case."

In 1923 Sir Henry Duke P. had before him *Forster* (orse. *Street*) v. *Forster*,[16] in which the wife sought a decree of nullity on the ground of unsoundness of mind. There was no appearance on behalf of the husband, and counsel for the wife asked[17]: "'Assume that for three weeks before the ceremony he had been "'drinking large quantities of whiskey, was he, on February 8, "'1923, in your opinion, in a condition to understand all the "'consequences of matrimony.' (The President): 'Did you ever "'know anybody who was in a condition to understand all the "'consequences of matrimony?' (The witness): 'No, my "'Lord'."

That shows something of the difficulty of formulating the right test. The President in the course of his judgment, granting the declaration prayed, said[18]: "The mind of one of the parties may "be capable of understanding the language used, but may yet "be affected by such delusions, or other symptoms of insanity, "as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into. Now that the "respondent knew that he had proposed marriage and the effect "of the ceremony and its primary consequences I cannot doubt, "but whether his mind at the time was in such a condition that "he appreciated and understood the effect of the ceremony is "more doubtful. The evidence of members of his family has "satisfied me that he was not normal, and that there have been "in the past recurrent periods during which he behaved in an "unaccountable way after consuming large quantities of alcohol. "I have had before me, too, a number of mental specialists, who

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[11] 10 P.D. 93.
[12] Ibid. 95.
[13] [1908] P. 308.
[14] 10 P.D. 93, 95.
[15] [1908] P. 308, 310.
[16] (1923) 39 T.L.R. 658.
[17] Ibid. 659.
[18] Ibid. 661.

" tell me on their responsibility, and indeed on their oath, that " there were with the respondent recurrent periods in which he " was the victim of what are called 'grandiose delusions.' If I " had believed that the petitioner had been imposed upon by a " rascal—as I was at one time much inclined to believe—I must " have refused her the relief which she sought. But I have come " to the conclusion that at the end of January and the beginning " of February the respondent really held the deluded belief that " he was an officer holding a responsible and trusted command, " and that he suffered from delusions as to his own persona, as to " his position in the world, and as to his capacity to perform any " of the obligations which he undertook—delusions which rendered " his life at that time an unreal thing. On that finding I hold " that he was mentally incapable of entering into the contract of " marriage and I pronounce a decree nisi of nullity of marriage."

Sir Henry Duke P. had been referred to the decision of Shearman J. in *Baldwin* v. *Baldwin*,[19] in which the judge had held that the husband in that case had not the judgment necessary to enter into a contract of marriage.

Mr. Latey referred to *Cole* v. *Cole*,[20] in which the headnote reads: " 1. Marriage—Voidable for insanity. Marriage is a civil " contract, and may be avoided like any other contract, for want " of sufficient mental capacity in the parties. If the mind is " unsound at the time, it is incapable of consent, and that is an " essential element in all contracts. 2. It is a general rule that " those who have not the regular use of their understanding " sufficient to deal with discretion in the common affairs of life, " or the weakness being so considerable as to amount to derangement, are incapable of contracting a valid marriage. Bishop's " Mar. and Div., section 117. 3. Practice—Proof of Insanity. In " an application to annul a marriage, on the ground of the insanity " of one of the parties at the time thereof, the proof of such " insanity must be clear and unquestionable."

The opinion of the court was delivered by Caruthers J., who said[21]: " Marriage, by our law, is a civil contract, and may be " avoided, like any other contract, for want of sufficient mental " capacity in the parties. If the mind is unsound at the time, it " is incapable of consent, and that is an essential element in all " contracts. In the dark ages, when there was thought to be " something sacred and mysterious in the matrimonial relation,

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[19] The Times, July 30, 1919.

[20] (1857) 5 Sneed's Tennessee Rep. 56.

[21] Ibid. 58.

C. A.
1953

In the Estate of Park, decd.
Park
v.
Park.

Singleton L.J.

" and its civil was almost obliterated by its spiritual character, " the marriage of persons of unsound mind was held valid. Black- " stone, in the second volume of his Commentaries, 438, 439, " says this was 'a strange determination, since consent is abso- " 'lutely requisite to matrimony, and neither idiots nor lunatics " 'are capable of consenting to anything'. The test question in " all such cases is whether the party is capable of making any " binding contract. The identity of the doctrine that unsoundness " of mind vitiates this as well as all other contracts is well " established. But every consideration of policy and humanity " admonishes us that a contract so essentially connected with the " peace and happiness of individuals and families, and the well- " being of society, should not be annulled on this or any other " ground, not clearly made out. The consequences, in many " cases, would be most deplorable. The rights of property would " be unsettled and the peace of families destroyed, to say nothing " about the effects upon the innocent offspring. The annulment " of other contracts would only affect property; but this would do " that, and more—it would tell upon the happiness, character, " and peace of the parties. The appalling character of these con- " sequences is well calculated to impress the courts with the " solemn duty of requiring a clear case for the application of the " general principle to this delicate and important contract. It is, " however, only a civil contract, and must stand or fall by the " usual tests applicable to contracts. It is not every unsoundness " that will avoid a contract. The degree necessary to produce " this effect is fixed by the law, and must be made out by proof. " All persons of lawful age are presumed to be capable of con- " tracting, until the contrary is made to appear. So, sanity is " presumed, and if the contrary is alleged, it must be proved by " the party imputing it. If a state of permanent insanity is once " shown, the burden of proof shifts, and a lucid interval must be " proved by the other side. But the rule is different in a case of " temporary insanity, depending on some exciting cause not in " perpetual action. The general rule is, 'that those who have " 'not the regular use of their understanding, sufficient to deal " 'with discretion in the common affairs of life, or the weakness " 'being so considerable as to amount to derangement, are " 'incapable of contracting a valid marriage, or making any other " 'binding contract.' (Bishop on Mar. and Div., section 177.) " Sir John Nicholl, in *Browning* v. *Reane*,[22] says: 'If the

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[22] 2 Phill.Ecc. 69, 70.

C. A.
1953

IN THE ESTATE OF PARK, DECD.
PARK
v.
PARK.

Singleton L.J.

" 'incapacity be such that the party is incapable of understanding " 'the nature of the contract itself, and incapable, from mental " 'imbecillity, to take care of his or her own person and property, " 'such an individual cannot dispose of his or her person and pro- " 'perty by the matrimonial contract, any more than by any other " 'contract.' It is difficult to describe any exact, palpable line " between legal capacity and incapacity. Perhaps this is imprac- " ticable, as an abstract thing, in reference to the ability to make " a valid contract, as insanity subsists in various degrees, and the " line of separation between it and mere imbecility is often faint " and imperceptible. The general test is the fitness of the person " to be trusted with the management of himself and his own " concerns. Such a person has a disposing, contracting mind, " although it may be in a degree impaired."

The question, I think, is this: Was the deceased on the morning of May 30, 1949, capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract. That is the test I would apply, and my reading of the judgment of Karminski J. satisfies me that he put to himself the right question. He had to make up his mind on the evidence given before him. He was not content to rest his decision on any question of onus of proof. He said [23]: " I have come to the " conclusion that he could and did understand the nature of the " contract he was entering into, and I find that the ceremony " of marriage in fact performed on May 30, 1949, between the " deceased and the plaintiff constituted a valid and binding " marriage between them."

This court ought not to interfere with that finding. Nor do I think that we ought to order a new trial, though I do not pretend that I regard the case with a satisfactory feeling. The question of fitness to marry might have been raised on the hearing before Pearce J. and a jury. Counsel agreed that it could have been set up in the reply or by an amendment of the claim. If that had been raised, the jury would have had to decide not only the question of fitness to make a will, but also fitness to marry. It would have been more fitting and more satisfactory if both issues had been determined at the same time.

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[23] Ante, 112.

In the circumstances, I do not think that we ought to prolong this litigation, and in my view the appeal should be dismissed.

Birkett L.J. I am of the same opinion. The issue before this court is whether Karminski J. was right on the facts and in law in deciding that the marriage which took place on May 30, 1949, between the deceased and the plaintiff was a valid and binding marriage in that the deceased at the time of the ceremony of marriage, could, and did, understand the nature of the contract he was entering into.

The difficulty in the case arose largely because of the extraordinary circumstances surrounding the ceremony of marriage on that day.

The startling fact is that the will of May 30, 1949, has at the instance of Mrs. Park been pronounced against after a verdict by a jury that at the time when the deceased executed that will he was not of sound mind, memory and understanding, and the substance of the case which she put forward to support that plea was essentially the substance of the case that Peter Park put forward in the present action. The evidence which convinced the jury in 1950 that the deceased was not of sound mind, memory and understanding was largely supplied by Mrs. Park herself, and it consisted of a long record of strange and most eccentric behaviour on many occasions before the actual ceremony of marriage: for example, the deceased's belief that he was already married to her on May 13 and other like matters. Most people, without giving thought to the matter, would say that if a man was in fact of unsound mind, memory and understanding at 3 o'clock on the day of his wedding, it does not want very much to show that at 11 o'clock on that day he was not fit to be married.

Apart from this difficulty there was the fact that on May 28, when the marriage settlement was to be executed, when the preferred ordinary shares were to be settled on Mrs. Park by common consent, the deceased was utterly incapable of understanding what was happening, or what he was doing. Now, surely it is most amazing that two days before this old man of 78 was married, when he was asked to execute a settlement of certain shares, the evidence shows that he was utterly incapable even of repeating the words, and when words were put to him he repeated something entirely different.

On any view of the case, the picture of the evidence presented the deceased on the day of his marriage as an old man, quite senile, suffering from disease, and incapable, in the true sense, of looking after himself continuously, subject to periods such as that I have considered on the 28th when he did not know what he was doing; and it is not to be wondered at that his regular medical attendant strongly advised against the marriage.

But the marriage took place, and the question before this court is not whether it was wise; nor even whether, in all the circumstances, it was decent. The simple question is that which I have stated, whether at the time of the ceremony the deceased was mentally capable of understanding the nature of the contract of marriage so that the marriage could be regarded as valid.

Mr. Beyfus, who had appeared for Mrs. Park in the proceedings before Pearce J. and a jury, and also in those before Karminski J. with regard to the marriage, submitted that there was in fact no inconsistency between the two cases he presented on the two occasions. He said that the issue before Pearce J. was that the deceased was not fit to make a particular will; and in the second action he submitted that the deceased, although he was not fit to make that particular will, which was of rather a complicated nature, was fit to enter into this contract of marriage; and he harmonized those two things, submitting that the difficulties which I have mentioned could be removed if the exact nature of the illness from which the deceased suffered was fully understood.

As I understand Mr. Beyfus's argument, it was that the deceased did not suffer from any disease of the mind as those words are usually employed. There was no suggestion that he thought himself to be other than he was; there was no confusion of identity or matters of that kind; and the position on the evidence of the medical men was really this: here was a man of 78 who admittedly suffered from hardened arteries, and from a weakened heart, and the combination of those things was such that there were times when the heart was unable to supply the millions of brain cells with the necessary blood so that the brain might work effectively. But there were occasions, said Mr. Beyfus, when the heart was able to perform that function and to supply the brain with all the necessary blood for its proper action. That really depended on these circumstances, that if the deceased was sufficiently interested in any particular matter, then there was provided the necessary stimulus whereby the heart functioned, and the blood was supplied; the words used by Mr. Beyfus were that the deceased then had complete understanding; but if the subject under discussion was a matter in which he took no interest, or which rather bored him and made him listless, then the necessary stimulus was lacking and blood was not supplied to the brain. For example, figures and details of the business were matters in which the deceased, at the age of 78, did not appear any longer to be interested, and it would seem that from 1948 onwards his effective interest in the business had never been what it was in the earlier days when a prosperous business had been built up; but there were some things, golf, for example, in which he was still keenly interested, and he could speak about the trophies he had won and of the pleasant days he had spent on the golf links. That was a matter which so interested him that he became clear and coherent because blood was being supplied to his brain. Similarly, it appears that he was interested in freemasonry, and that was a subject which had the same effect on him. So, Mr. Beyfus said, with regard to this all-important matter of his marriage, there was no doubt that that was a matter in which he was most keenly interested, and with regard to it, the actual fact of entering into the contract of marriage, he was completely alert.

Karminski J., who, no doubt, heard the same arguments, stated in his judgment [24]: " There can in my view be no doubt " that from the early part of 1949 the deceased was anxious to " have a permanent female companion with whom he was pre- " pared to go through a ceremony of marriage."

The deceased was obviously a lonely man; the death of his wife after 50 years had been a terrible blow, and it is understandable that an old and sick man should feel more secure if he had a companion always with him. The judge so found; and if Mr. Beyfus is right, that was a matter which would stimulate him, and on the particular matters relating to it his mind would be fully occupied.

Karminski J. said in his judgment,[25] quoting from *Hunter* v. *Edney* (orse. *Hunter*) [26]: " ' The question which I have to " ' determine is not whether she was aware that she was going " ' through the ceremony of marriage, but whether she was " ' capable of understanding the nature of the contract she was " ' entering into, free from the influence of morbid delusions upon " ' the subject ' "; and later he said [27]: " I ask myself the

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[24] Ante, 105

[25] Ante, 99.

[26] 10 P.D. 93, 95.

[27] Ante, 100.

"question asked in *Hunter* v. *Edney* (orse. *Hunter*) by Sir James "Hannen P.; was the deceased capable of understanding the "nature of the contract he was entering into?"

Before us, Mr. Salmon said that there were certain matters which ought to be kept in mind: there should be knowledge of the ceremony itself; the parties must understand the nature of the contract; the parties must understand their rights and the responsibilities that marriage creates, as, for example, the husband's duty to maintain his wife; each party to the contract must be able to take care of his or her person and property, and it is not enough that the parties should appreciate that they are taking part in a marriage ceremony or that they should be able to follow the words of the service; if the parties lacked the qualities mentioned in his three previous submissions, the marriage was invalid.

My Lord has dealt fully with that question and cited the answer which was quoted in the course of the case with regard to the normal and usual understanding, and I think it is quite clear that Karminski J. had the all-important question clearly before him.

Mr. Beyfus submitted, therefore, that what this court had to do was to consider three things: did the judge misunderstand the evidence given? I do not think that anyone could say that Karminski J. did, because his judgment gave an admirable summary of all the important evidence in the case, and certainly on that point no one could say that he misunderstood it.

The next question which Mr. Beyfus said that the court must ask itself was: did Karminski J. draw the wrong inferences from the evidence? If so, this court was in an equally good position to draw what it considered to be the right inferences. Then, finally, he said, did the judge make any mistake in the law which he applied to the facts of the case?

On that last matter Mr. Salmon complained of the approach which the judge had made to this question when he said [28]: "Mr. "Beyfus, for the plaintiff, argued that the capacity required to "make a will was of a higher degree than that required to con"tract a marriage, and he relied on the direction to the jury "given by Sir James Hannen P. in *Boughton* v. *Knight*.[29] Sir "James Hannen stated the proposition in the following terms: "'Whatever degree of mental soundness is required for any one

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[28] Ante, 97.

[29] L.R. 3 P. & M. 64, 72.

" ' of these things—responsibility for crime, capacity to marry, " ' capacity to contract, capacity to give evidence as a witness— " ' I must tell you, without fear of contradiction, that the highest " ' degree of all, if degrees there be, is required in order to con- " ' stitute capacity to make a testamentary disposition. And you " ' will easily see why. Because it involves a larger and wider " ' survey of facts and things than any one of those matters to " ' which I have drawn your attention.' Sir James Hannen P. " expanded and explained this passage in *Burdett* v. *Thompson*,[30] " when he said, speaking of the making of a will, ' From the " ' character of the act it requires the consideration of a larger " ' variety of circumstances than is required in other acts, for it " ' involves reflection upon the claims of the several persons who, " ' by nature, or through other circumstances, may be supposed " ' to have claims on the testator's bounty, and the power of " ' considering these several claims, and of determining in what " ' proportions the property shall be divided amongst the " ' claimants; and, therefore, whatever degrees there may be of " ' soundness of mind, the highest degree must be required for " ' making a will.' "

He said that that was important because of the decision of the jury in 1950. I think that it is a little unfortunate that the judge changed the word. Sir James Hannen quite clearly was speaking about degrees of soundness of mind and that whatever degrees there may be, the highest degree must be required for making a will.

Karminski J. continued [31]: " . . . I approach the facts of this " case on the basis that a lesser degree of capacity is required to " consent to a marriage than in the making of a will."

It is perfectly plain, of course, that there are degrees of soundness of mind, and in one of the early cases quoted to us—*Turner* v. *Meyers* (orse. *Turner*) [32]—which I think must have been before the court in *Cole* v. *Cole* [33] when it gave its judgment, because the court in the latter case reproduced much of the language of Sir William Scott in *Turner* v. *Meyers*, Sir William Scott said, on this question of unsoundness of mind, nearly 150 years ago [34]: " Madness is a state of mind not easily reducible " to correct definition, since it is the disorder of that faculty " with which we are little acquainted; for all the study of man- " kind has made but a very moderate progress in investigating

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[30] L.R. 3 P. & M. 64, 73n.

[31] Ante, 97.

[32] (1808) 1 Hag.Con. 414.

[33] 5 Sneed's Tennessee Rep. 57.

[34] 1 Hag.Con. 417.

"the texture of the mind, even in a sound state. In disease, "where it has pleased the Almighty to envelope the subject "matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well "known. We learn from experience and observation all that we "can know, and we see that madness may subsist in various "degrees, sometimes slight, as partaking rather of disposition or "humour, which will not incapacitate a man from managing his "own affairs, or making a valid contract. It must be something "more than this, something which, if there be any test, is held "by the common judgment of mankind to affect his general "fitness to be trusted with the management of himself and his "own concerns."

Then in *Boughton* v. *Knight*,[35] in the note which Sir James Hannen added on *Burdett* v. *Thompson*[36] to explain the misunderstanding which had arisen on his judgment, he said: "The "question of unsoundness of mind is one of degree, and it is "impossible to lay down any abstract proposition of law which "will guide you in determining it."

So there can be no doubt that there are degrees of unsoundness of mind, and, of course, there can be degrees of capacity quite apart from unsoundness of mind. Some men are very able and some are not, and it is understandable, for example, that one might have an illiterate, uneducated man perfectly sound of mind, but not of a high quality, who was able to understand the contract of marriage in its simplicity, but who then came into a sudden accession of wealth, as one sometimes reads in these days a man of that character doing, who might be quite incapable of making anything in the nature of a complicated will, quite apart from unsoundness of mind; I think, therefore, that it was a little unfortunate that it was put in the way it was, and a pity that that matter was introduced into this case at all.

I think that the test is as my Lord defined it: on the facts of this case is it shown that this man was not of the mental capacity to understand the nature of the contract? I cannot think that the degrees of unsoundness of mind really can have much effect on that question.

It was said, and with truth (and my Lord quoted the passage) that the contract of marriage is in its essence one of simplicity; and the real question is simply, yes or no, is it shown that this man was not mentally capable of understanding the contract into which he had entered? The test applied by Karminski J. was the proper test, and so all this discussion about degrees does not matter, because it is quite plain, when the judge's judgment is read, that he had in mind what the requisites of a valid contract of marriage were, what was to be understood; and that he applied that test to the evidence given with regard to the morning of May 30. I think that he had before him all the essential matters which he ought to have had in coming to his decision. He clearly appreciated the degrees which I have mentioned, and I think that he had in mind the submissions made by Mr. Beyfus.

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[35] L.R. 3 P. & M. 64.

[36] Ibid. 72n.

He said [37]: " The evidence in this case is at many points " conflicting "—as, indeed, it was—" and the conflict has not " been made easier to resolve because it has come (apart from " that of the plaintiff) from witnesses whom I have regarded as " reliable and truthful. In my view the conflicting nature of the " evidence can be largely explained by the fact that from the " summer of 1948 until his death in June, 1949, the condition of " the deceased varied from day to day and sometimes, as " Dr. Urwick found, almost from hour to hour. It is important " to recognize that the deceased was a man who had been of good " business and general intelligence, able to build up and to direct " a successful trading company. This is certainly not a case " where a man has from birth been deprived of the usual intellectual faculties or had been in any sense mentally deficient." That is why I think that the judge was influenced by the submissions which Mr. Beyfus made.

Finally, after reviewing the whole of the evidence, and saying that Lady Greer (an old friend of the deceased) was a witness of high standing, whose evidence he accepted, and recognizing the conflicting character of the evidence, and having in mind all the circumstances of the case on the one side and on the other, and having before him the clear tests which he had to apply to determine the issue before him, he said [38]: " In the course of his " argument Mr. Salmon accepted that no high intellectual " standard was required in consenting to a marriage; he further " accepted that the burden was on him to prove the invalidity of " a marriage in form properly celebrated. If he has failed to " discharge that burden of proof then the plaintiff must succeed "; and the judge was clearly of opinion that he had failed to discharge that burden of proof, because he went on to say [38]: " But I prefer " in this case to answer the question posed to himself by

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[37] Ante, 110.

[38] Ante, 111.

"Sir James Hannen in *Hunter* v. *Edney* (orse. *Hunter*)[39]: was "the deceased capable of understanding the nature of the contract "he was entering into, free from the influence of morbid delusions "on the subject? It is not an easy question in this case to "answer: I have had to consider carefully the manifest mental "weaknesses and confusions of the deceased on the one hand, and "his pertinacity and determination with regard to the marriage "on the other. I have come to the conclusion that he could and "did understand the nature of the contract he was entering into "and I find that the ceremony of marriage in fact performed on "May 30, 1949, between the deceased and the plaintiff constituted "a valid and binding marriage between them."

Therefore Karminski J. in coming to his conclusion quite palpably had every one of those conflicting matters in mind, and most of all this variation from day to day and from hour to hour. In these circumstances I do not feel that it is possible to depart from that decision, and this appeal ought to be dismissed.

Hodson L.J. The defendant has contended that Karminski J. misdirected himself in law when he said at the outset of his judgment that he approached the facts in this case on the basis that a lesser degree of capacity is required to consent to a marriage than in the making of a will. As I understand the matter, capacity is equivalent to mental capacity, and that is equivalent to soundness of mind, and it was in that sense that the judge was using the word "capacity." The judge felt that the distinction was of importance, having regard to the fact that in an earlier case the court had pronounced against the will of the deceased made on the same day as the marriage following on the verdict of a jury who answered in the negative the question: "Do you find the testator at the time of the execution "of the will was of sound mind, memory and understanding?" In my opinion, there is no sliding scale of soundness of mind by reference to which different matters on which the law is required to take cognizance may be measured. The authority of Sir James Hannen P. in *Boughton* v. *Knight*,[40] and *Burdett* v. *Thompson*,[41] do not, I think, support such a proposition. Indeed, in the latter case, Sir James Hannen was at pains to point out that it had been erroneously supposed that he had said it required

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[39] 10 P.D. 93, 95.
[40] L.R. 3 P. & M. 64.
[41] Ibid. 72n.

C. A.
1953

IN THE ESTATE OF PARK, DECD.
PARK
v.
PARK.

Hodson L.J.

a greater degree of soundness of mind to make a will than to do any other act. He said that he never said that or meant to say that. He repeated that if one is at liberty to draw a distinction between various degrees of soundness of mind; then whatever is the highest degree of soundness of mind is required to make a will. In the former case he had pointed out that, in considering the question of whether the testator is of sound disposition, one cannot put aside the contents of the will, and the surrounding circumstances connected therewith, and this passage indicates that one cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject-matter of the particular case.

It is true that the jury answered in general terms the question put to it in the probate action in which the will of the deceased made on May 30 was disputed, but the question was not answered without a direction from the judge as to the facts of the particular case, and the answer to the question cannot be treated as if it were a certificate of insanity concerning the condition of the deceased on that day a few hours after his marriage had taken place.

The contents of a will vary greatly from one case to another, as also the surrounding circumstances, and similar considerations apply to any transaction which a man may seek to carry through. It is true, as Sir James Hannen pointed out in *Durham* v. *Durham*,[42] that the contract of marriage is a very simple one which does not require a high degree of intelligence to comprehend, and in *Browning* v. *Reane*,[43] Sir John Nicholl said of marriage that it was " the most important contract of life, the very essence " of which is consent."

In dealing with the contract of marriage into which the deceased purported to enter on May 30, the judge had these considerations in mind, and I think that he directed himself correctly. What he said about the approach to the problem cannot be described as a misdirection, since the trial of the issue of capacity in the earlier probate action was, as Mr. Beyfus pointed out, a trial of a different issue where the evidence was different, and in which the burden of proof lay on different sides, and in dealing with the contract of marriage the judge had the right considerations in mind; he concluded by asking himself

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[42] 10 P.D. 80, 82.

[43] 2 Phill.Ecc. 69.

C. A.
1953

In the Estate of Park, decd.
Park
v.
Park.

Hodson L.J.

the right question, namely, the one posed, again by Sir James Hannen, in *Hunter* v. *Edney* (orse. *Hunter*)[44]: "Was the "deceased capable of understanding the nature of the contract "she was entering into free from the influence of morbid delusions "upon the subject?" He answered the question in favour of the plaintiff, and did so deliberately after a review of the evidence, refraining from resting on the ground that the defendant had not discharged the burden of proof. In arriving at his conclusion he gave, as his careful and clear analysis of the evidence shows, due weight to all relevant matters and did not, I think, lay undue stress, as was contended on behalf of the defendant, on the central fact that the deceased was aware that he was being married at the time when the forms prescribed by law for a marriage in a register office were being followed. The evidence accepted by the judge pointed clearly to the fact that the deceased had determined to marry the plaintiff in the knowledge that she was the successor to his former wife with whom he had enjoyed many years of happy marriage. The evidence also showed that he was aware of the duties and responsibilities to her in the sense that he took steps to make a home for her with him at the flat in which he had previously lived, and took steps to make room for her there by securing the removal of other persons; the evidence also shows that he was aware of his duty to make financial provision for her.

Mr. Salmon contended that in the senile condition in which the deceased undoubtedly was he could not take care of his person and property, so that he could not dispose of his person and property by the matrimonial contract any more than by any other contract. In this contention he was supported by the authority of Sir John Nicholl in *Browning* v. *Reane*,[45] to which I have referred previously. Although this language may, no doubt, be interpreted in such a way as to lend support to the defendant's argument based on the facts of this case, I do not think that the judge can be said to have erred in arriving at the conclusion in favour of the plaintiff on this point. Indeed, on the totality of the evidence, leaving out of account the evidence of the plaintiff, unreliable as it was except where it was expressly or tacitly admitted by other witnesses whose evidence the judge

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[44] 10 P.D. 93.

[45] 2 Phill.Ecc. 69.

C. A.
1953

In the Estate of Park, decd.
Park v. Park.

accepted, I think that the conclusion was right. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Lewis W. Taylor & Co.; Ager & Ager; Pritchard, Englefield & Co., for Boote, Edgar & Co., Manchester.*

M. M. H.

1953
Nov. 23.

Karminski J.

McLELLAN *v.* McLELLAN.

Husband and Wife—Maintenance—High Court—Wilful neglect to maintain—Order of the High Court—Power to date payments from issue of summons—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23—*Matrimonial Causes Rules,* 1950 (*S.I.* 1950, *No.* 1940), *r.* 56 (10).
Maintenance—Power to date payments from issue of summons.

The court has power under section 23 of the Matrimonial Causes Act, 1950, to order periodical payments to run from the date of the summons once wilful neglect to provide reasonable maintenance has been proved.

Application respecting the operative date of an order made by Karminski J. on November 13, 1953, under section 23 of the Matrimonial Causes Act, 1950, whereby the husband was ordered to make periodical payments to the wife of £850 a year and to secure to the wife further periodical payments of £150 a year.

The originating summons was issued on May 27, 1953, and net payments of £125 were made by the husband between that date and the hearing of the summons on June 10, 1953, to cover the three months ending May 30, 1953, and on August 6, 1953, to cover the three months ending August 31, 1953. No further payments had been made.

No mention was made at the hearing of the date from which the periodical payments should run, but the order as drawn dated the payments as from November 13, 1953, the date of the hearing.

Roger Ormrod for the wife. The proper order should be that the payments should date from May 27, 1953 (the date of the summons), credit being given for the £125 paid in August, 1953. Such an order would be within the powers given to the court by rule 56 (10) of the Matrimonial Causes Rules, 1950,[1] and in accordance with the general practice of the courts, as, for example, in the case of writs: the rights arise as from the date on which the writ is issued. Any other interpretation would result in a husband who wished to be obstructive being able to leave his wife without support until the hearing which he himself had delayed.

Victor Williams for the husband. Neither the rules nor the statute made any provision for alimony pending suit in proceedings under section 23 of the Matrimonial Causes Act, 1950,[2] and the legislature must have intended to make no such provision. It must therefore follow that until there has been a finding of wilful neglect to maintain there can be no order, neither one which would amount by backdating to an order for alimony pending the hearing of the suit, nor one for interim payments. The reference in the rule to an interim order only applies after the actual finding, and the words "final determination" relate only to the question of quantum.

[KARMINSKI J. referred to the powers of justices under section 6 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925,[3] to make interim orders on an application for maintenance although no finding had been made of wilful neglect to maintain or otherwise.]

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[1] Matrimonial Causes Rules, 1950, r. 56: "(10) On the hearing of the "application the judge may make "such order as he thinks fit, or may "refer the application to a registrar "for an investigation into the means "of the parties to the marriage and, "pending the final determination of "the application, the judge may make "an interim order upon such terms "as he may think just."

[2] Matrimonial Causes Act, 1950, s. 23: "(1) Where a husband has "been guilty of wilful neglect to pro- "vide reasonable maintenance for his "wife or the infant children of the "marriage, the court, if it would have "jurisdiction to entertain proceedings "by the wife for judicial separation, "may, on the application of the wife, "order the husband to make to her "such periodical payments as may be "just; and the order may be enforced in the same manner as an order for "alimony in proceedings for judicial "separation. (2) Where the court "makes an order under this section "for periodical payments it may, if it "thinks fit, order that the husband "shall . . . secure to the wife the "periodical payments. . . ."

[3] Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 6 (1): "Where, on the hearing of an "application for an order of mainten- "ance, the application is adjourned for "any period exceeding one week, the "court may order that the husband "do pay to the wife . . . a weekly "sum . . . for the maintenance of the "wife and any child or children in "her custody until the final deter- "mination of the case: Provided that "the order directing such payment "shall not remain in operation for "more than three months from the "date on which it was made."

1953

McLellan v. McLellan.

Karminski J. I have power under section 23 (1) of the Matrimonial Causes Act, 1950, to order periodical payments to run, once wilful neglect to provide reasonable maintenance has been proved, from the date of the summons. The statute itself provides that the court may " on the application of the wife, order " the husband to make to her such periodical payments as may " be just." The section does not indicate from what date the order may run. I think that the section is intended to leave the matter of date very largely in the hands of the court and to leave fairly wide discretion. If, as Mr. Williams has claimed, an order can run only from the finding of wilful neglect, gross injustice might be done to a wife; and Mr. Ormrod has indicated some of the mischief which might follow, such as an obstructive husband deliberately holding up the course of the inquiry by a refusal to disclose his means and disobedience, perhaps, to an order for discovery.

I feel little doubt that the section intends the court to have power to go back to the date of the application, as indeed it has in the not wholly dissimilar case where alimony pendente lite is awarded. In the case of alimony pendente lite the court has power to start the order, and indeed it usually does, from the date of service of a petition; in maintenance the order usually runs from decree absolute. I think that the discretion of the court is sufficiently unfettered by the section to allow me to order the payments to date from the date of a summons. In this particular case it is fair to say, first of all, that there has been no delay or obstruction by the husband, and secondly, that although in my view he was guilty of neglect to provide reasonable maintenance, I never found and, indeed, could not possibly have found on the figures that he had neglected to pay any maintenance at all. I think that the right order here is that maintenance should run from the date of the summons, credit to be given by the wife for all sums received from the husband since that date.

Solicitors: *Kenneth Brown, Baker, Baker; W. T. Donovan.*

J. B. G.

SPALENKOVA *v.* SPALENKOVA.

1953
July 27.

Willmer J.

Husband and Wife—Divorce—Service of petition—Application to dispense with service—Respondent a political prisoner—Discretion—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940), *r.* 9 (5).

A wife resident in England presented a petition wherein she alleged that she had been deserted by her husband, who had, so far as was known, remained under restraint as a political prisoner in Czechoslovakia since 1950. A copy of the petition had been sent to the place of his detention, a further copy had been sent through the Czechoslovak embassy in London, and a further copy had been sent to a relative in Czechoslovakia at his previous home. Although there was some ground for believing that the husband might have received one of the copies of the petition, no acknowledgment had been returned; there was no means of knowing what his answer to the allegation of desertion might be; and there were grounds for believing that he would not in any case be allowed to take any part in the case while detained. The wife applied pursuant to rule 9 (5) of the Matrimonial Causes Rules, 1950, for leave to dispense with further attempts to serve the petition:—

Held, (1) that although there was some reason to believe that the petition had in fact been received by the respondent, there was no certainty of this;

(2) That although the refusal of leave might cause grave hardship to the wife, if such leave were granted there might shortly be a decree absolute in respect of which the husband would have had no opportunity of being heard. The hardship to him might be irrevocable, but there could be no finality if the application were refused, for what was refused today might through a change of situation be readily granted tomorrow.

(3) That in such circumstances, and after consideration of the balance of hardships upon the two parties, the application should in the exercise of the court's discretion in such matters be refused.

Read v. *Read* [1942] P. 87; 58 T.L.R. 160; [1942] 1 All E.R. 226, and *Luccioni* v. *Luccioni* [1943] W.N. 42; 59 T.L.R. 165; [1943] 1 All E.R. 260; (on appeal) [1943] P. 49; 59 T.L.R. 202; [1943] 1 All E.R. 384, considered.

Weighman v. *Weighman* [1947] W.N. 307; 64 T.L.R. 40; [1947] 2 All E.R. 852; *Heath* v. *Heath* [1950] P. 193; 66 T.L.R. (Pt. 1) 1093; [1950] 1 All E.R. 877, and *Paolantonio* v. *Paolantonio* [1950] W.N. 355; 66 T.L.R. (Pt. 2) 235; [1950] 2 All E.R. 404, distinguished.

SUMMONS (adjourned into court).

A wife, resident in England, presented a petition for divorce on the ground that she had been deserted by her husband, then domiciled and believed to be detained in Czechoslovakia as a political prisoner.

1953

SPALENKOVA
v.
SPALENKOVA.

The following statement of facts is taken from the judgment: According to the wife's affidavit the relevant facts, so far as they could be ascertained, were that the parties lived together for a short time after the war, mostly in Czechoslovakia, and that at some time in 1947 the wife came to England, leaving the husband still residing in Czechoslovakia. It was stated by the wife that there was some kind of understanding between them that the husband was to leave Czechoslovakia and come to England for the purpose of joining her after the lapse of some few months. The husband, however, did not come to this country, and the wife alleged that when she wrote to him he ignored her letters. She remained in correspondence and continued to correspond with the husband's sister-in-law, who lived in Czechoslovakia; and from information derived from that source it appeared that at some time in 1950 the husband was arrested, and had remained under some form of restraint ever since. There was no evidence whatsoever to show that the husband had been guilty of any criminal offence. The inference was that he had been put under restraint as a political prisoner and for political reasons. That inference was to some extent supported by one of the more recent letters from the husband's sister-in-law, in which, after commenting on the comparatively recent release of certain political prisoners in Czechoslovakia, she went on to say that unhappily the husband had not so far obtained his release.

The court was satisfied that the wife had made every reasonable attempt to serve the petition. A copy had been sent through the post to the address where the husband was known to be detained. Another copy had been sent through the Czechoslovak embassy in London. A third attempt was made to serve him by sending a copy to his sister-in-law's address, which had been his home before his arrest. But there was no answer. The most recent of all the letters received from the husband's sister-in-law, a letter of June 15, 1953, which was received after the hearing of the case in chambers, gave some ground for thinking that the husband might possibly have received one or other of those copies of the petition.

The wife now applied for leave to dispense with further attempts to serve the petition. The court asked for the assistance of argument on behalf of the Queen's Proctor.

M. P. Picard for the wife. The husband should be found upon the facts to have made up his mind some years before his arrest never to return to his wife. The position, therefore, is analogous to that in *Weighman* v. *Weighman*.[1] Grave hardship might be inflicted upon a wife, who appeared upon the evidence to be the innocent party, if her application were refused, and an unreasonable burden should not be put upon an innocent petitioner who has taken all reasonable steps to see that the respondent had knowledge of the proceedings: *Heath* v. *Heath*.[2] In *Igra* v. *Igra*[3] the English court did not consider that there had been a failure of natural justice although a decree had been granted in Germany without the knowledge of the other spouse, then resident in England. *Luccioni* v. *Luccioni*[4] is to be distinguished on the facts.

Colin Duncan for the Queen's Proctor. In view of the circumstances in which the husband has been detained, which render his ability to return a signed acknowledgment of service, or to enter appearance, uncertain, this is not a case where the court in its discretion should grant leave to dispense with service. Unlike *Weighman* v. *Weighman*,[5] there is insufficient evidence here to indicate that the husband must have known that a divorce would be contemplated, or that he had definitely made up his mind never to return to his wife. [Reference was made to the cases cited in the judgment and to *Craig* v. *Kanssen*.[6]]

WILLMER J. In this case a petitioning wife asks the leave of the court to dispense with service on the respondent in circumstances which I will in one moment relate. The case came before me in chambers, but when I heard the facts I felt that it raised difficult problems on which I should welcome the assistance of argument on behalf of the Queen's Proctor. I therefore adjourned the matter into court, and today, thanks to the assistance of counsel on behalf of the Queen's Proctor, I have been rewarded with a most interesting and illuminating argument.

The case arises under the provision which is now contained in rule 9 (5) of the Matrimonial Causes Rules, 1950, whereby it is provided that "service may be dispensed with altogether in any "case in which it may appear necessary or expedient to do so." The rule substantially re-enacts the provisions of section 42 of the Matrimonial Causes Act, 1857, which has now been repealed.

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[1] [1947] W.N. 307; 64 T.L.R. 40; [1947] 2 All E.R. 852.

[2] [1950] P. 193, 196; 66 T.L.R. (Pt. 1) 1093; [1950] 1 All E.R. 877.

[3] [1951] P. 404, 411; [1951] 2 T.L.R. 670.

[4] [1943] P. 49; 59 T.L.R. 202; [1943] 1 All E.R. 384 (C.A.).

[5] [1947] W.N. 307; 64 T.L.R. 40.

[6] [1943] K.B. 256, 262; [1943] 1 All E.R. 108.

That section, after providing that a petition was to be served on the party to be affected thereby, contained a proviso that the court might dispense with such service altogether in case it should seem necessary or expedient so to do.

The wife is a woman of English origin, and has been resident in this country for a number of years. The respondent husband, to whom she was married during the war, is of Czechoslovak origin. The petition is presented in pursuance of the rights conferred by section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, and it may very well be that one of the effects of that new provision of the legislature will be to give rise to a number of applications of this sort by wives resident in this country as against husbands domiciled abroad. [His Lordship then stated the facts in the wife's affidavit as set out above and, after referring to the possibility that the husband might have received a copy of the petition, continued:] But that, to my mind, is not the whole of the difficulty in this case, because even if one were to assume that in all probability the husband has received a copy, or that the petition has been brought to his attention in some way, there are, as it seems to me, good grounds for drawing the inference that during his present detention he would not in any case be allowed by the responsible authorities to take any part in the case; and by that I mean that not only would he not be allowed to defend it, but it may very well be that he is not even allowed to send off the acknowledgment of service enclosed with the petition.

For reasons which I have given, there is no means of knowing what, if any, the husband's answer to the charge of desertion might be. He may wish, for all that is known, to deny that he ever had any animus deserendi. Or again, for all that is known, he may wish to set up that he had just cause for not rejoining his wife. It seems clear that three years had not elapsed by the time he was placed under restraint. Those are the facts in relation to which I have to decide whether or not leave to dispense with further service should be granted.

I have, I believe, been referred to all the relevant authorities in which similar questions have arisen. But it has been forcefully and rightly pointed out to me by both counsel that in the end the matter is entirely one for my unfettered discretion. It is, however, useful to look at the reports of some of the cases which have arisen, especially as several of them have reached the Court of Appeal. One cannot help but receive some guidance from such authority even on a matter of the exercise of discretion.

I have already referred to the provisions of section 42 of the Act of 1857, now substantially re-enacted in the Matrimonial Causes Rules of 1950. I think that I am right in saying that until recent times the power conferred by the section was a power which the court was seldom called upon to exercise. No doubt this was due to the natural reluctance of any court in this country to allow any proceedings, particularly proceedings affecting status, to continue against a party who had no opportunity of being heard. That attitude of the courts of this country was well summed up in the words of Lord Greene M.R. in *Read* v. *Read*,[1] where he said: "The system of constructive service where a "defendant can have judgment recovered against him without "his having any opportunity of knowing that the proceedings "are on foot is a thing against which English jurisprudence has "always set its face, . . ." Cases did arise, however, during the recent war, and *Read* v. *Read* [1] was one of them. Another, *Luccioni* v. *Luccioni*,[2] was decided by Lord Merriman P., and was subsequently reviewed by the Court of Appeal.[3]

Both those cases arose out of applications to dispense with service on a respondent who was either an enemy alien or, at any rate, resident in enemy territory; and in both cases the ultimate decision was against granting leave to dispense with service. Lord Merriman P., when the matter was before him in *Luccioni* v. *Luccioni*,[4] made some remarks which have since been quoted more than once, and I make no apology for reading again what was then said [5]: "In my opinion, in the case of petitions which "involve a change of status, and where any form of substituted "service is impossible, the court, before dispensing with service, "should require to be satisfied that the respondent spouse has "become aware of the fact that the petition is being prosecuted, "or, at the very least, of the intention to prosecute it, and in "either case has had time and opportunity to indicate whether "he or she desires to defend."

In the Court of Appeal some criticism was directed in argument to those words of Lord Merriman P., and it was suggested that he was going at any rate some way towards fettering the discretion which the court undoubtedly has.[6] The Court of Appeal, however, rejected that argument,[7] and, I think it can be said, accepted and endorsed what was said by the President, to the extent that circumstances such as those referred to were circumstances properly to be taken into consideration when the court was called upon to exercise its discretion under this provision.

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[1] [1942] P. 87, 91; 58 T.L.R. 160; [1942] 1 All E.R. 226.

[2] [1943] W.N. 42; 59 T.L.R. 165; [1943] 1 All E.R. 260.

[3] [1943] P. 49.

[4] 59 T.L.R. 165.

[5] Ibid. 166.

[6] [1943] P. 49, 50.

[7] Ibid. 51–2.

There is, as it seems to me, a marked similarity between the case of a respondent who is in enemy territory, and for that reason unable to communicate, and a respondent who is detained in a foreign country as a political prisoner, and for that reason equally unable to communicate. Undoubtedly, as it seems to me, this is a case in which the considerations referred to by the President in the passage which I have just read apply with the fullest possible force.

It is proper, however, to refer to the fact that since the date of those decisions there have been three further cases which have gone to the Court of Appeal, in each case on appeal from the refusal of a judge of this Division to grant leave to dispense with further service; and in each of those cases the Court of Appeal, for various reasons, have thought it right to allow the appeal and grant the leave that was asked.

The first of those cases was *Weighman* v. *Weighman.*[8] In that case a man had emigrated to Canada many years previously and left his wife in this country. The wife sought to institute proceedings on the ground of desertion, but when an attempt was made to serve the petition it proved impossible to find the husband. He had, however, written a letter to the wife some time before the attempt to serve the petition, in which he informed her that he had left his old address; but he gave no new address, and he further informed her that he never intended to return to England. It became clear (oddly enough from the report of one of the other cases to which I will have occasion to refer in a moment) that that letter was in response to a letter from the wife asking him what he proposed to do about rejoining her. Be that as it may, the Court of Appeal in that case thought that leave to dispense with service ought to be granted, on the basis that it was a fair inference on the facts that the husband not only knew and recognized that he was in desertion, but furthermore that he recognized that there was at least a likelihood of proceedings being taken. That was a consideration which had been specifically dealt with in those words of Lord Merriman P. which I have quoted from *Luccioni* v. *Luccioni*[9]; in other words,

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[8] [1947] W.N. 307.

[9] 59 T.L.R. 165, 166.

Weighman v. *Weighman* [10] was a case in which the Court of Appeal acted under one of the possibilities envisaged by the President. I do not think in the circumstances that I can derive very much assistance from the view which the Court of Appeal took of the special facts in *Weighman* v. *Weighman.*[10]

The second case, *Heath* v. *Heath*,[11] was an appeal from my own refusal to grant leave to dispense with further service. That case arose out of very different facts. The ground on which it was eventually decided by the Court of Appeal was that all the probabilities went to show that the husband, who was being proceeded against for desertion, had in fact received the petition, although he had not taken the step of sending back the acknowledgment of service. The case was relied on, however, by Mr. Picard for the present petitioner, because of certain remarks made by Bucknill and Denning L.JJ. in the course of their judgments. Bucknill L.J. said [12]: "It is difficult, however, to lay down any "principle in a case of this kind, except the principles which I "have tried to indicate. One is that all reasonable steps should "be taken to see that the respondent has knowledge of the "proceedings. The other is that an unreasonable burden should "not be put on an innocent petitioner like this wife before she is "able to be released from a marriage, which is no marriage now "except in its legal aspects, and from a man who has deserted "her and her child as this husband has done." Denning L.J. summed the matter up quite briefly by saying [13]: "If the probabilities are that the respondent has received the petition and "simply declined or omitted to sign the acknowledgment, then "the court can dispense with further service."

It will be observed from what I have said that in that case there was no question of the respondent being under any form of restraint. That complicating feature of the present case was absent from that case. What the Court of Appeal were concerned with there was the question whether or not the respondent had probably received the petition; the further question whether, if he had, he had had any reasonable opportunity either of acknowledging receipt or of indicating what course he wished to take, did not arise in the case and was not, of course, present to the minds of the Lords Justices when giving their judgments. That peculiarity of the present case seems to me to be a feature which distinguishes it from that decision of the Court of Appeal.

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[10] 64 T.L.R. 40.

[11] [1950] P. 193.

[12] [1950] P. 193, 196.

[13] Ibid. 196.

The last and most recent case in the Court of Appeal to which I was referred was *Paolantonio* v. *Paolantonio.*[14] That, again, was a case of a wife's petition which she was endeavouring to serve on a husband whose last known address was in the United States. The facts in that case really amounted to this, that the respondent had been completely lost, and that nobody had the faintest idea where he had gone to, although it was thought that he might have returned to Europe. In those circumstances there was no address at which he could be served either personally or by post, and it was impossible to conceive of any satisfactory means of substituted service which would be likely to have any effect. There was no particular newspaper whose advertisements it might be expected that the respondent would see, and in those circumstances the Court of Appeal thought it right to make an order dispensing with further service of the petition. The case is very remote from the present one, and I should not have thought it necessary to refer to it at all but for some remarks made in the concluding sentences of Tucker L.J.'s judgment. Those remarks might, as it seems to me, be read as amounting to a statement of some rigid rule, which would have the effect of fettering the discretion of the court. Tucker L.J., referring to the judgment of the judge below, said[15]: "Not being able to bring the case "within the four corners of *Weighman* v. *Weighman*,[16] he appears "to me to have regarded himself as accordingly precluded from "dispensing with service; otherwise there could be no ground for "refusing the order. I think that there must be cases, of which "this is one, although they will necessarily be few, where, once "the court is satisfied, as I am in the present case, that the only "suggested method of substituted service is not only beyond the "means of the applicant, but will be ineffective, justice requires "that the court should exercise its discretion to dispense with "service of the petition."

It may be said that those rather wide words might be applied in this case. For I cannot help being satisfied that no suggested method of substituted service would be in the least effective here. It might be thought that the Lord Justice was enjoining any judge who found himself in that position to decide the case in a particular way. Bearing in mind that it has been laid down so often that this is a matter for the unfettered discretion of the judge, I cannot read those observations of Tucker L.J. as being intended in any way to fetter my discretion, any more than the words of the President in *Luccioni* v. *Luccioni* [17] to which I have previously referred.

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[14] [1950] W.N. 355; 66 T.L.R. (Pt. 2) 235; [1950] 2 All E.R. 404.

[15] 66 T.L.R. (Pt. 2) 235, 239.

[16] 64 T.L.R. 40.

Having mentioned those three cases, all of which went to the Court of Appeal, and in all of which leave to dispense with further service was granted, I leave them with the observation that each of the three seems to me to be very remote from the facts of this case. The facts of this case, as I have already indicated, much more nearly resemble the war-time cases of *Read* v. *Read* [18] and *Luccioni* v. *Luccioni*.[19]

In the present case, although, as I have said, there is ground for thinking that the respondent may have received a copy of the petition, I cannot be satisfied that in all probability he has. Certainly it seems to me that there is no ground at all for thinking that he has had any opportunity either of presenting his defence, if he has one, or even of indicating whether he does wish to defend. For all I know, if I grant leave in this case to dispense with service I may be causing a grave injustice to the respondent. I say that because, if leave is granted, it seems clear that the petitioner would have every opportunity of obtaining a decree in an undefended suit; within a few weeks from now, if service is to be dispensed with, there may be a decree absolute in respect of which this respondent will have had no opportunity of being heard.

Against that it is said, and said very forcibly and very properly, that if I do not grant leave to dispense with service in this case I may be inflicting a very grave hardship on the wife. The wife, so far at any rate as her own story as presented to the court goes, is an innocent person, an innocent victim of her husband's wrongdoing. It has been pressed upon me that not only would I be inflicting hardship on her by leaving her married, notionally at any rate, to the present respondent, but that I might be depriving her of the opportunity of finding happiness in marriage with another man. I am conscious that if I refuse leave the petitioner may suffer grievous hardship. I have to balance the possible hardships on the one side against those on the other. I do not think that it is possible to make any order either way in this case without incurring at least the risk of causing grievous hardship to one side or the other.

What has finally influenced me as to the way in which I should exercise my discretion is the fact that if I act in one way the

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[17] 59 T.L.R. 165, 166.

[18] [1942] P. 87.

[19] 59 T.L.R. 165; [1943] P. 49 (C.A.).

1953

SPALENKOVA
v.
SPALENKOVA.

Willmer J.

damage may be irrevocable, whereas, if I act the other way, certainly no irrevocable damage will have been done. If I allow service to be dispensed with, as I have said, within a few weeks it seems almost certain that a decree absolute will be pronounced, as to which the respondent will never have been heard, and which may cause him hardship, which I have already described as grievous, and which may be irrevocable. If, on the other hand, I decline to exercise my discretion in that way, there is no finality about it. The petitioner may have to wait, but for all I know she may not have to wait long, before she can proceed. The situation in Czechoslovakia may change; there may be a release of further political prisoners which may result in this respondent obtaining his freedom. There may be a change of policy, which will enable the respondent at least to acknowledge service of the petition and to indicate whether he desires to defend or not. Again, with the passage of time, further and different opportunities may arise of devising some other form of service upon this respondent. It would be, I think, unwise to prophesy what may happen. I do not wish to raise the hopes of the petitioner too high, but undoubtedly the possibility exists that what I refuse today may readily be granted tomorrow. In the circumstances as they exist today I cannot exercise my discretion in favour of the wife petitioner. I feel that I ought to refuse the leave which is asked for in this case.

Application dismissed.

Solicitors: *Amphlett & Co.; The Queen's Proctor.*

J. B. G

C. A.

1953
Dec. 11, 14, 15, 16, 17.

Singleton, Birkett and Hodson L.JJ.

THE ASSUNZIONE.

Conflict of Laws—Contract—Proper law—Charterparty—Bill of lading—Presumptions—Law of flag—Lex loci contractus—Cargo shipped at French port by French charterers and shippers on Italian vessel—Italian consignees—Bill of lading made in Paris in French language—Proper law governing the contract—Intention of the parties to be imputed from all surrounding circumstances—Charterers a Government agency—Circumstances unknown to one party. Presumptions.

In pursuance of a charterparty negotiated between brokers resident in France on behalf of French shippers, and brokers resident in Italy on behalf of Italian shipowners, the Italian steamship *Assunzione* loaded a cargo of wheat at Dunkirk for delivery to an Italian port. The charterparty was made on the Gencon form in the English language and was signed on behalf of the charterers in Paris and headed "Paris, 7th October, 1949." It provided for 80 per cent. of the freight to be paid in Italian currency to the credit of Italian brokers within eight days after the vessel sailed from Dunkirk; any demurrage or damages for detention at both loading and discharging ports was also to be paid for in Italian currency. Bills of lading dated October 21, 1949, were signed on behalf of the master at Dunkirk. They were in the French language and contained expressions peculiarly of French use. The wheat was shipped under an exchange agreement (of which the shipowners were not aware of the terms) made between the French and Italian Governments in settlement of a loan of a similar commodity and quantity. On appeal from the decision of Willmer J., on a preliminary point of law, that the contract was to be governed by Italian, not French, law:—

Held, that where in a contract of affreightment there was no evident common intention, or neither of the parties had formed any intention, the court would impute their intention and determine for the parties what was the proper law which, as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract, and the court would have regard generally to all the surrounding and relevant circumstances known to both parties.

Mount Albert Borough Council v. *Australasian Temperance and General Mutual Life Assurance Society Ld.* [1938] A.C. 224, 240; 54 T.L.R. 5; [1937] 4 All E.R. 206; and *Rex* v. *International Trustee for the Protection of Bondholders A/G* [1937] A.C. 500; *per* Lord Atkin (at p. 529) 53 T.L.R. 507; [1937] 2 All E.R. 164 applied.

In the present case the ship was an Italian ship owned by two Italians in partnership and the vessel sailed under the Italian flag; the master was an Italian; the contract was for carriage from a French port to an Italian port; the cargo was to be delivered at an Italian port; the charterparty provided that freight and demurrage should be paid in Italian currency and the bills of lading were indorsed by Italian consignees. Those circumstances satisfied the court that the Italian law was to be applied and the appeal would be dismissed.

Decision of Willmer J. [1953] 1 W.L.R. 929 affirmed.

APPEAL from the decision of Willmer J.[1] on a preliminary point of law whether French or Italian law should be applied to a contract of affreightment.

The French charterers of the Italian vessel *Assunzione*, under a charterparty made in Paris in respect of a cargo of grain shipped at Dunkirk for delivery at Venice, sued the owners of the *Assunzione* for short delivery and damage to the cargo and, on a preliminary point of law, applied for an order that the French law was to be applied to the contract of affreightment. The Italian shipowners resisted the application contending that Italian law was the proper law of the contract. Further material facts are fully set out in the judgment of the Court of Appeal.

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[1] [1953] 1 W.L.R. 929.

The following facts appeared from an agreed statement: The plaintiff charterers are a French organization called Office National Interprofessionel des Cereales. The defendant shipowners are an Italian partnership comprising two brothers carrying on business in Genoa and Naples. The *Assunzione* at all material times was of Italian registry and flew the Italian flag.

On May 21, 1949, a written exchange agreement was made between the High Commissioner for Food of the Italian Republic acting through Federazione Italiana dei Consorzi Agrari (hereinafter called "Federazione") of the one part and the High Commissioner for Food of the French Republic acting through the charterers of the other part, whereby it was agreed, inter alia, as follows: (*a*) That the High Commissioner for Food of the Italian Republic should put at the disposal of the High Commissioner for Food of the French Republic certain quantities of grain and flour to be delivered in France by July 15, 1949. (*b*) That the charterers should subsequently make restitution of such grain and flour by delivering like quantities to Italian ports by January 1, 1950. (c) That the guiding principle of the agreement should be that it should bring no profit and cause no loss to the Italian Government. The agreement was drawn up in the French and Italian languages.

On October 7, 1949, in Paris the charterers, in pursuance of their obligation to make restitution under the exchange agreement, entered into a charterparty with the shipowners whereby they chartered the defendants' s.s. *Assunzione* to carry a cargo of wheat from Dunkirk to Italy. The charterparty was negotiated through brokers in Paris and in Genoa by cables, telephone and correspondence. The defendants were not at any material time aware of the terms of the exchange agreement. The charterparty was drawn up in the English language using the printed form of Uniform General Charter of the Documentary Council of the Baltic and White Sea Conference; code name "GENCON." The operative part was headed "Paris, 7th October 1949." An addendum, in the French language, stated that the nominal charterers named in it "agit pour le compte" of the plaintiff charterers. Freight and demurrage was expressed to be payable in Italian lire in Naples.

On October 21, 1949, at Dunkirk there were issued two bills of lading signed on behalf of the master of the *Assunzione* in respect of a quantity of wheat shipped on board the said vessel at that port by French cargo superintendents as agents for the charterers, who were the owners of the cargo. The bills of lading were drawn up in the French language and provided, inter alia, for carriage to Venice and delivery to order on payment of freight "suivant charte-partis datée de Paris du 7.10.49."

At some time between October 21, 1949, when the *Assunzione* sailed from Dunkirk, and December 10, 1949, when she arrived at Venice, the bills of lading upon presentation of which the cargo was ultimately delivered were indorsed in blank by the French cargo superintendents and sent through the post to Italian cargo superintendents. Thereafter they were transmitted by those cargo superintendents to Federazione and indorsed by the latter in Venice before presentation to the ship.

Sir Robert Aske Q.C., *H. V. Brandon* and *J. S. Wordie* for the appellant charterers. The question on this preliminary point depends on the terms of the charterparty, on the bill of lading and on all the surrounding circumstances as evidenced by an agreed statement of facts. That the charterparty is headed "Paris, 7th October, 1949" shows that it is a French contract. There can be no other reason for which "Paris" was inserted. There is a primary presumption that the law of the place where a contract is made governs it. In the present case the charterers and the shippers were the same persons and, therefore, according to English law, the bill of lading would have operated merely as a receipt given by the shipowners to the charterers or shippers. That is not quite the position under French or Italian law, where the two documents together constitute the contract. The charterparty was made in Paris and signed by persons in Paris; the bills of lading were wholly in the French language, and the phraseology used was peculiarly French, particularly the passage which, translated, reads: "I [the master] pledge my body, my possessions "and my ship." Although the charterparty was made on an English form, there is no suggestion that English law was to govern the contract.

Where the parties have not stated in the contract which law was to govern, the question depends entirely on their intention and must be determined by the court on the inferences to be drawn from the contract and all the surrounding circumstances. The courts have developed prima facie inferences or presumptions

C. A.
1953
THE ASSUNZIONE.

in this connexion, some of which—such as the lex situs in relation to movables—are almost conclusive. The primary inference or presumption in other cases is that the lex loci contractus applies. That can be rebutted by the surrounding circumstances. The court starts with that primary presumption and seeks to apply to it all the surrounding circumstances of the case. The contention against the charterers is that the law of the flag is the primary presumption. Admittedly the law of the flag applies in certain cases of agency of necessity where, for instance, a ship has been obliged to put into a port in distress and the master has had to enter into a bottomry or respondentia bond: Carver's Carriage of Goods by Sea, 9th ed., pp. 401–402; Scrutton on Law of Charterparties and Bills of Lading, 15th ed., art. 107, p. 303, note u. Outside cases of that character, however, the ordinary presumption of the lex loci contractus applies. There is no apparent reason why contracts of carriage by sea should be considered in any way different from that applicable of other contracts where made between persons of different nationalities. The law of the flag can always be taken into account as one of the surrounding circumstances, but all of the surrounding circumstances must be taken into account, including—the language of the contract, its form and phraseology, and the places where it is made and performed. One can rely no more on discharge in Italy than in loading in France. The fact that a party to the contract was a Sovereign State, and the exchange agreement, are also relevant surrounding circumstances.

[HODSON L.J. Even if one party did not know of those facts?]

So it is submitted. They show what the charterers had in mind.

Since *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ld.*[2] one can write off any presumption of lex loci solutionis. [Reference was also made to *Peninsular and Oriental Steam Navigation Co.* v. *Shand*[3]; *Lloyd* v. *Guibert*[4]; *The Wilhelm Schmidt*[5]; *The Express*[6]; *Chartered Mercantile Bank of India, London and China* v. *Netherlands India Steam Navigation Co. Ld.*[7]] *Lloyd* v. *Guibert*[8] was an exceptional case: the master had given a bottomry bond. Reliance is placed particularly on the judgments of Brett and Lindley L.JJ. in *Chartered Mercantile Bank of India*,

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[2] [1938] A.C. 224, 240; 54 T.L.R. 5; [1937] 4 All E.R. 206.

[3] (1865) 3 Moore P.C. (N.S.) 272.

[4] (1865) L.R. 1 Q.B. 115.

[5] (1871) 25 L.T. 34.

[6] (1872) L.R. 3 A. & E. 597.

[7] (1883) 10 Q.B.D. 521.

[8] L.R. 1 Q.B. 115.

London and China v. *Netherlands India Steam Navigation Co. Ld.*,[7] which was a most important decision on this branch of law. It establishes that in considering the intentions of the parties as to the law governing a contract such as the present one, unless there is some good ground to the contrary, the prima facie presumption is that the lex loci contractus applies. *In re Missouri Steamship Co.*[9] and *The Industrie*[10] are also relied on.

The consideration of " business efficacy " (see *per* Lord Merriman P. in *The Njegos*[11]) has merely introduced a new surrounding circumstance and taken away presumptions laid down in the several decisions which provided the guiding principles. Lord Atkin said in *Rex* v. *International Trustee for the Protection of Bondholders A/G*[12] that the intention of the parties to the contract was to be presumed by the court and the court would be guided by the rules laid down and from all the surrounding circumstances of the case. The guiding primary rule is to be the place where the contract is made. Where a Sovereign State is one of the parties, it is not conclusive that the law of that State applies, but is an important fact which the court should take into consideration.

[Birkett L.J. In Carver's Carriage of Goods by Sea, 9th ed., p. 399, it is stated that the law of the flag will be regarded " only " in the last resort if [the court] is unable otherwise to ascertain " the intention of the parties."]

There must be a prima facie inference or presumption from which the court will begin to consider the question and to which all other surrounding circumstances will be applied in coming to the court's conclusion as to what law the parties to a contract of affreightment intended was to govern the contract. In the present case, this primary presumption is the place where the contract was made, namely, Paris. Neither side contended in the court below that there was no primary presumption. The charterers contended for the lex loci contractus; the shipowners for the law of the flag. Willmer J. founded on four points: (1) That the ship's flag was Italian; (2) that the cargo was for delivery in Italy; (3) that the freight was payable there; and (4) that it was likely, and must have been in the minds of the parties, that the property in the cargo would pass to an Italian national in the course of the voyage. The judge decided the question on grounds of "convenience and business efficacy." That hypothesis was manifestly wrong. The charterers had to make restitution of total quantities of grain loaned to them by Italy and which had to be marketable. Any claim for shortage must be made to the Office Nationale which, if not a part of the Government of France, was, at least, representative of a Sovereign State. The Italian Government was not liable for any damage to the wheat; that was a liability of the Office Nationale. If salvage services were rendered to ship and cargo the Italian Government was in no wise interested. Those facts are enough to dispose completely of the hypothesis on which the judge based his judgment. The judgment raises a new presumption, namely, that of convenience or business efficacy, i.e., where owner of the ship resides. That presumption is vague and unsubstantial, and ought to be rejected. The charterers present the case on the old historic grounds, namely, that the governing circumstances are the place where the charterparty contract was made, Paris; the peculiarly French expressions used in the bill of lading, and that part of the contract was to be performed in France. The appeal ought to be allowed.

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[7] (1883) 10 Q.B.D. 521.

[9] (1889) 42 Ch.D. 321.

[10] [1894] P. 58.

[11] [1936] P. 90, 107.

[12] [1937] A.C. 500; 53 T.L.R. 507; [1937] 2 All E.R. 164.

A. A. Mocatta Q.C. and *R. P. Colinvaux* for the respondent shipowners. All the facts of the case must be considered before applying any of the presumptions. It would be wrong first to select one of the recognized presumptions and then consider the facts applicable. The courts do not approach this class of case in the way contended for by the charterers. It is only when the court cannot decide on the facts that, in the last resort, the court will fall back on the presumptions. That is the invariable practice of the courts.

The test is what the parties as reasonable men ought to have intended. Without applying presumptions, the scale here tips in favour of Italian law. Evaluation of the facts here falls under seven heads: (1) The charterers are French; they were a French organization. It is pure surmise to say that they were a Sovereign State. The court is not entitled to consider the charterers to be other than a French organization. (2) The ship is an Italian ship, flying the Italian flag. (3) The contract was to carry the cargo from a French port to an Italian port, and to deliver it at an Italian port. (4) It is an important fact that the freight was to be paid in Naples in Italian currency eight days after the master's telegram to his owners, and 80 per cent. was to be paid "ship "lost or not lost," the balance to be paid in Italian lire after the cargo was discharged at port of discharge. Demurrage (if any) was to be paid in Dunkirk in Italian lire. (5) The charterparty was signed in Paris; the bill of lading was signed in Dunkirk. It is submitted that the parties would have been equally bound if the charterparty had not been signed at all, because the contract was previously negotiated by cable, telephone and letter; the contract was complete before the formal charterparty was sent to the charterers. (6) The language used in both charterparty and bill of lading does not carry one far; the value of that is negative. (7) The bills of lading were made "to order": they required indorsement and were indorsed by Italian indorsees. One must not consider factors only within the knowledge of one party, such as the exchange agreement.

It is submitted that on those facts it is the law of Italy which governs this contract, and that any dispute was to be determined by the Italian courts. The doctrine of convenience is no more than a relevant factor, but it was stressed as a factor as early as *Lloyd* v. *Guibert*.[13] Clause 8 of the charterparty provides that the shipowners shall have a lien on the cargo for, among other causes, the payment of freight; such claims against the charterers would accordingly be litigated in Italy. The most important claims which may be anticipated against the shipowners are those for shortage of, or damage to, cargo, which may not be discoverable by the charterers or consignees until after the discharge and departure of the ship. In that case the ship could not be arrested at the port of discharge and there might be great difficulty in tracing her and getting satisfaction of the charterers' claim in rem, and the charterers could only look for satisfaction in personam, from the shipowner at his place of residence, again in Italy. [*The Wilhelm Schmidt*,[14] and *Ministry of Food* v. *Australian Wheat Board*,[15] and Dicey's Conflict of Laws, 6th ed., p. 579, rr. 136, 584 (1), 595, 604, 616, 619, 657, 664, 665, were referred to.] Dicey's comment on the lex loci contractus contains no material on this aspect of the matter which supports the contentions of the charterers; on the contrary, it tends to destroy them. [Reference was also made to *The Adriatic*[16]; *Peninsular and Oriental Steam Navigation Co.* v. *Shand*[17]; *Lloyd* v. *Guibert*,[18] and *The Express*.[19]]

The present case is not one dealing with the authority of the master but one of affreightment.

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[13] L.R. 1 Q.B. 115.

[14] (1871) 25 L.T. 34.

[15] [1952] 1 Lloyd's Rep. 297.

[16] [1931] P. 241.

[17] 3 Moore P.C.(N.S.) 272.

[18] L.R. 1 Q.B. 115.

[19] L.R. 3 A. & E. 597.

C. A.
1953

THE ASSUNZIONE.

In *Chartered Mercantile Bank of India, London and China* v. *Netherlands India Steam Navigation Co. Ld.*[20] it was laid down that the facts were to be considered first; that the law of the flag was to be looked at, but was not conclusive. Regarded as a whole that case is far from conclusive that the lex loci contractus is the controlling fact, as the charterers here contend. The facts should be considered first—the presumptions last. Reliance is placed on the words of Lord Esher M.R. in *The Industrie.*[21]

If a presumption has to be considered, it must be that of the law of the flag: see *Rex* v. *International Trustee for the Protection of Bondholders A/G*,[22] *per* Lord Atkin and Lord Russell. This appeal should be dismissed.

Colinvaux following. This is a case where the facts are evenly balanced and, therefore, the court should apply the presumption of the law of the flag. *Lloyd* v. *Guibert* [23] determined that that was the presumption applicable, as a general proposition, for contracts of affreightment generally. Lindley L.J. misinterpreted the effect of that case in the *Chartered Mercantile Bank* case.[24] If that had weakened the authority of *Lloyd* v. *Guibert*,[23] and the court were faced with two conflicting Court of Appeal decisions, it would be necessary to look to the reasons for choosing, as the relevant presumption, the law of the flag. It would then become apparent that no other general presumption could reasonably be chosen in respect of contracts of affreightment. It is fortuitous where a charterparty may be signed and, regarding bills of lading, these may be issued at many different countries in the course of one voyage. New contracts will spring up wherever they are transferred. The lex loci contractus would be a ridiculous presumption to choose for general application in these circumstances. The law of the flag is the only consistent factor.

Sir Robert Aske Q.C. replied.

On June 11, 1953, Willmer J.[1] made an order that Italian law was the proper law which governed the contract, holding that the fundamental consideration in determining the question was the mutual intention of the parties to the contract; that the nationality of the ship's flag, and the place where the contract was made were no more than considerations which the court must take into consideration in inferring what intention ought

[20] 10 Q.B.D. 521.

[21] [1894] P. 58, 73.

[22] [1937] A.C. 500, 530, 555; 53 T.L.R. 507; [1937] 2 All E.R. 164.

[23] L.R. 1 Q.B. 115.

[24] 10 Q.B.D. 521.

[1] [1953] 1 W.L.R. 929.

to be imputed to the parties; and that in inferring that intention it was necessary to consider what intention reasonable business men would have been likely to have had—which was very much what was convenient or would give business efficacy to the contract.

The plaintiff charterers appealed.

SINGLETON L.J. This appeal from a judgment of Willmer J. arises out of a claim made by the plaintiffs, the owners of cargo lately laden on board the vessel *Assunzione*, against the defendants, who are the owners of the ship. The plaintiffs were charterers of the *Assunzione*, and they claimed against the shipowners damages in respect of damage to, and short delivery of, a cargo of wheat which was being carried by the *Assunzione* from Dunkirk to Venice. There is also a claim to recover the proportion of a salvage award which had to be paid on behalf of the cargo. We are concerned only with a preliminary point, and that is, what is the law to be applied to the contract of affreightment which was made between the parties?

It appears from the pleadings that both parties were at one time prepared to put the case in the alternative, that either the law of France or the law of Italy should govern the contract, but it was ascertained that the law of Italy contains certain provisions which would react unfavourably upon the plaintiffs' claim, and they now contend that the law of France should be applied, while the shipowners say that the law of Italy should be applied.

There is an agreed statement of facts. Paragraph 1 reads: "The plaintiffs are a French organization called Office National "Interprofessionel des Cereales. The defendants are an "Italian partnership comprising two brothers carrying on "business in Genoa and Naples. The *Assunzione* at all "material times was of Italian registry and flew the Italian flag."

Paragraph 2: "On May 21, 1949, a written exchange agree-"ment was made between the High Commissioner for Food "of the Italian Republic acting through Federazione Italiana "dei Consorzi Agrari (hereinafter called 'Federazione') of the "one part and the High Commissioner for Food of the French "Republic acting through the plaintiffs of the other part whereby "it was agreed inter alia as follows:—(a) that the High Com-"missioner for Food of the Italian Republic should put at the "disposal of the High Commissioner for Food of the French

C. A.
1953

THE ASSUNZIONE.

Singleton L.J.

"Republic certain quantities of grain and flour to be delivered "in France by July 15, 1949; (b) that the plaintiffs should "subsequently make restitution of such grain and flour by "delivering like quantities to Italian ports by January 1, 1950; "(c) that the guiding principle of the agreement should be that "it should bring no profit and cause no loss to the Italian "Government." That agreement was drawn up in the two languages and there is a copy of it at pages 18 and 19 of the file.

Article 2 of the agreement provided: "(b) The restitution "will take place on dates to be determined by mutual agree-"ment between the Federazione and O.N.I.C. It shall ter-"minate, with the grain back in Italian ports, before January "1, 1950. (c) The restitution ports are limited to those on the "following list:—Genoa, Leghorn, Civitavecchia, Gulf of "Naples, Messina, Catania, Palermo, Gagliari. (d) The tonnage "to be shipped to each of the above-mentioned ports and the "dates of shipment will be determined by mutual agreement "between the Federazione and O.N.I.C. O.N.I.C. reserves "the right of altering the tonnage indicated above according to "the capacity of the steamers in accordance with a proportion "that shall not exceed 10 per cent. one way or the other. Art. "3. The guiding principle of the exchange operations to which "the present agreement relates is that the said operations will "not bring any profit, or cause any loss to, the Italian "Government . . ."

It was in compliance with the clause as to restitution that grain was to be shipped, and was shipped, from France to Italy in October, 1949.

Paragraph 3 of the agreed statement of facts reads: "On "October 7, 1949, in Paris the plaintiffs, in pursuance of their "obligation to make restitution under the said exchange agree-"ment, entered into a charterparty with the defendants whereby "they chartered the defendants' ss. *Assunzione* to carry a cargo "of wheat from Dunkirk to Italy. The said charterparty was "negotiated through L. Azerad & Fils, brokers in Paris, and "Ballestrero Tuena & Canepa, brokers in Genoa, as appears from "the cables and correspondence. . . . The defendants were not "at any material time aware of the terms of the said exchange "agreement." I draw attention to the fact that it was common ground that the shipowners were not aware of the terms of the exchange agreement between the departments of the Italian and French Governments.

The paragraph continues: "The said charterparty was drawn "up in the English language using the printed form of Uniform "General Charter of the Documentary Council of The Baltic "and White Sea Conference."

Paragraph 4: "On October 21, 1949, at Dunkirk, there were "issued two bills of lading signed on behalf of the master of the "*Assunzione* in respect of a quantity of wheat shipped on board "the said vessel at that port by Société Generale de Surveillance "S.A. (hereinafter called 'Surveillance') as agents for the plaintiffs who were the owners thereof. The said bills of lading were "drawn up in the French language and provided inter alia for "carriage to Venice and delivery to order on payment of freight "in accordance with the said charterparty," and the bills of lading are attached.

Paragraph 5 is in these terms: "At some time between "October 21, 1949, when the *Assunzione* sailed from Dunkirk, "and December 10, 1949, when she arrived at Venice, the bills "of lading upon presentation of which the cargo was ultimately "delivered were endorsed in blank by Surveillance and sent "through the post to Sorveglianza S.I.P.A. in Italy (hereinafter "called 'Sorveglianza'). Thereafter they were transmitted by "Sorveglianza to Federazione and endorsed by the latter in "Venice before presentation to the ship."

Paragraph 6: "During the course of the voyage of the *Assunzione* from Dunkirk to Venice carrying the said wheat damage "was sustained by and salvage services rendered to both ship "and cargo."

Paragraph 7: "On December 12, 1949, in Venice, a general "average agreement relating to the *Assunzione's* said voyage was "signed by Sorveglianza and the master of the said vessel."

Paragraph 8: "On or about December 24, 1949, the *Assunzione* completed discharge of her cargo."

The remaining paragraphs of the agreed statement of facts concern what followed and the nature of the claims; the first claim appears to have been made by a letter dated December 27, 1949. It is upon that agreed statement of facts and upon the documents that this preliminary point has to be determined.

Obviously I must refer to the charterparty, to which importance is attached by Sir Robert Aske. The charterparty is headed: "Paris, October 7, 1949," and from that comes the first point made by counsel on behalf of the plaintiffs. It is said that this charterparty was made in Paris between people who were in Paris, and that the fact that they put "Paris" at the

C. A.
1953

THE ASSUNZIONE.

Singleton L.J.

head of the document shows that they attached importance to the fact that the place at which the contract was made was in France.

It appears to me that it is desirable to look a little further into the matter; and on doing so one finds that the signing of the charterparty followed upon certain correspondence which had taken place. This shows that Ballestrero Tuena & Canepa, the Italian brokers, corresponded with L. Azerad, the French brokers, between October 5 and October 7, and I think it right to say that in general the terms of the charterparty were agreed in that correspondence before the actual charterparty was signed. I wholly agree with the submission of Sir Robert Aske that the parties contemplated that there should be a charterparty and that the negotiations which they had were leading up to that end; but, none the less, it is not a case of two parties who are resident in Paris, or whose headquarters are in Paris; it is not that kind of case. One party has its headquarters in Paris; the other side has its headquarters in Italy. Correspondence took place and, finally, the brokers signed the charterparty in Paris on October 7.

The charterparty provides that the vessel being so laden "shall proceed to one good and safe port, West coast Italy, "including Sicily or at charterers' option, one good and safe port, "Adriatic Coast Italy, amongst Bari, Ancona or Venice as "ordered on signing bills of lading or so near thereunto as she "may safely get and lie always afloat and there deliver the "cargo on being paid freight—on intaken quantity—as follows: "1,980 Italian lire per metric ton, if West Coast Italy, 2,205 "Italian lire per metric ton, if Adriatic Coast Italy." The cargo which she was to take on board was 7,000 metric tons, 5 per cent. more or less, quantity at master's option, wheat in bulk, 10 per cent. in bags. The provision as to payment, which was to be made in Italian lire, was relied upon by Mr. Mocatta, on behalf of the shipowners, in support of his submission to which I shall later refer.

In the original form of the charterparty the payment of freight was covered by clause 4. That clause is struck out, and in place of it reference has to be made to clause 16, and above clause 16 there is the heading: "Supplementary clauses of the "charterparty for ss. *Assunzione* dated Paris, October 7, 1949— "Dunkirk/Italy."

Clause 16 reads: "The freight is to be paid in Italian "currency to the credit of Fratelli Rizzuto, Naples. Eighty per "cent. (80) of the freight, after deduction of advances made at "loading port, if any, will be paid by charterers within eight "days after reception by 'L'Azerad, Paris' of the master's "telegram mentioning date of sailing, and amount of disburse-"ments at loading-port if any. Balance of freight to be paid "after discharge of the cargo, within eight days after reception "by charterers of the freight account duly viséd by their local "representative at discharging port. In any case, freight pay-"able discountless, considered earned on signing bills of lading "and non-returnable, ship and/or cargo lost or not lost."

Mr. Mocatta attaches importance to the fact that the freight was to be paid in Italian currency; that it had to be paid to the credit of Fratelli Rizzuto, Naples, that 80 per cent. of it was to be paid by charterers eight days after reception by L'Azerad Paris of the master's telegram mentioning date of sailing, and that the balance of the freight was to be paid at the discharging port. Those are all factors which he contends go towards supporting his case that the parties, if ever they had thought about this matter, would have regarded Italian law as the law which they would apply.

Other important clauses of the charterparty provide as follows—clause 7: "Demurrage at the rate of 180,000 Italian lire per "day or pro rata for any part of a day, payable day by day, to "be allowed merchants altogether at ports of loading and dis-"charging overtime if any, to be for charterers."

Clause 8: "Owners shall have a lien on the cargo for freight, "dead-freight, demurrage and damages for detention. Charterers "shall remain responsible for dead-freight and demurrage (in-"cluding damages for detention), incurred at port of loading. "Charterers shall also remain responsible for freight, dead-"freight, and demurrage (including damages for detention) in-"curred at port of discharge, but only to such extent as the "owners have been unable to obtain payment thereof by exer-"cising the lien on the cargo."

Clause 9: "Bills of Lading. The captain to sign bills of "lading at such rate of freight as presented without prejudice "to this charterparty, but should the freight by bills of lading "amount to less than the total chartered freight the difference "to be paid to the captain in cash on signing bills of lading."

The cargo was received, and bills of lading were issued on October 21 at Dunkirk. The bills of lading are in the French language and in French form, but there is stamped on each a

C. A.
1953

THE ASSUNZIONE.

Singleton L.J.

marginal note bringing in the provisions: "Both to blame collision clause" and the "General average and the new Jason "clause." The bills of lading themselves show that a parcel of wheat was received on board, and the destination was Venice, with delivery to order following the charterparty of October 7, according to the York and Antwerp Rules, and it ends: "... "L'accomplissement de ce que dessus j'ai obligé et obligé ma "personne, mes biens et mon dit bâtiment avec toutes ses "dépendances ..." That, as Sir Robert Aske pointed out, is a typical French clause by which the master binds his body, his goods and his ship in the fulfilment of his duty.

The plaintiffs arrested the ship, and an action was brought in this court. The action was by writ issued on October 27, 1950, and there have been various amendments of the pleadings.

Willmer J. came to the conclusion that the law of Italy should be applied to this contract. We have had a considerable number of authorities cited to us upon the question of what law should be applied. The parties did not state their desire, or their intention, upon the subject. It has been said that when that happens one must endeavour to find what the intention of the parties was on the matter. That does not appear to me to be very helpful, for in most cases neither party has given it a thought, and neither has formed any intention upon it; still less can it be said that they have any common intention. I am not sure how far it is necessary to consider all the authorities which have been cited to us, and which go back to the year 1865, but I must refer to some of them. Sir Robert Aske, on behalf of the plaintiffs, relies on what he described as the general rule; that is, that the law to be applied should be the law of the country in which the contract was made.

The first case to which I would refer, and the first to which Sir Robert referred, is *Peninsular and Oriental Steam Navigation Co.* v. *Shand*,[1] which was an appeal to the Privy Council from the Supreme Court of Mauritius. The facts in that case were that a passenger by an English vessel belonging to an English company from Southampton to Mauritius via Alexandria and Suez, took and signed a ticket, in the body of which the engagement of the company was stated to be subject to the conditions and regulations indorsed thereon; among which was this clause: "the company do not hold themselves liable for damage to, or "loss, or detention of passengers' baggage." A package of baggage being lost during the voyage, the passenger sued the company in the Supreme Court at Mauritius for damages for the loss. That court held that the contract was governed by the French law in force in Mauritius, and held that the company were liable.

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[1] (1865) 3 Moore P.C.(N.S.) 272.

The Privy Council reversed that judgment. The report is a long one. The opinion was given by Turner L.J. on July 20, 1865. The facts are set out quite clearly, and for myself I find it difficult to think how anyone travelling from this country to Mauritius on a ticket issued by the Peninsular and Oriental Line could expect the law of France to be applied to that contract which he, an English subject, made with an English company in this country for the carriage of himself and his personal baggage in a British ship. None the less, the court in Mauritius came to the conclusion that the law of France, which ran in Mauritius, ought to be applied. In the course of giving the opinion of the board Turner L.J. said[2]: "The general rule is, "that the law of the country where a contract is made governs "as to the nature, the obligation, and the interpretation of it. "The parties to a contract are either the subjects of the power "there ruling or as temporary residents owe it a temporary "allegiance: in either case equally they must be understood to "submit to the law there prevailing, and to agree to its actions "upon their contract. It is, of course, immaterial that such "agreement is not expressed in terms; it is equally an agreement "in fact, presumed de jure, and a foreign court interpreting or "enforcing it on any contrary rule defeats the intention of the "parties, as well as neglects to observe the recognized comity "of nations. Their Lordships are speaking of the general rule; "there are, no doubt, exceptions and limitations on its applic- "ability, but the present case is not affected by these, and "seems perfectly clear as to the actual intention of the contract- "ing parties. This is a contract made between British subjects "in England, substantially for safe carriage from Southampton "to Mauritius. The performance is to commence in an English "vessel, in an English port; to be continued in vessels which "for this purpose carry their country with them; to be fully "completed in Mauritius; but liable to breach, partial or entire, "in several other countries in which the vessels might be in the "course of the voyage. Into this contract, which the appellants "frame and issue, they have introduced for their own protection

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[2] 3 Moore P.C. (N.S.) 290.

"a stipulation, professing in its terms to limit the liability "which, according to the English law, the contract would otherwise have cast upon them."

Upon those facts it was held by the Privy Council that the law of England applied, and Sir Robert Aske placed reliance upon the words which I have read as to the general rule. There is no doubt of the strength of it in some cases. If two people resident in this country enter into a contract of carriage or of affreightment by which goods are to be carried to various quarters of the world in a ship belonging to one of the contracting parties, it might well be said that they both intended that the law of the country in which the contract was made should apply; in the case cited it was the law of the ship as well.

Another view was expressed in *Lloyd* v. *Guibert*,[3] of which the headnote reads: "Where the contract of affreightment does not "provide otherwise, as between the parties to the contract, in "respect of sea damage and its incidents, the law of the country to "which the ship belongs must be taken to be the law to which they "have submitted themselves. The plaintiff, a British subject, "chartered a French ship belonging to French owners, at a Danish "West India port, for a voyage from St. Marc in Hayti, to Havre, "London, or Liverpool, at charterer's option. The charterparty "was entered into by the master in pursuance of his general "authority as master. The plaintiff shipped a cargo at St. Marc "for Liverpool, with which the vessel sailed. On her voyage she "sustained sea damage and put into Fayal, a Portuguese port, "for repair. There the master properly borrowed money on "bottomry of ship, freight and cargo, and repaired the ship, "and she completed her voyage to Liverpool. The bondholder "proceeded in the Court of Admiralty against the ship, freight "and cargo. The ship and freight were insufficient to satisfy "the bond; and the deficiency with costs fell on the plaintiff "as owner of the cargo, for which he sought indemnity against "the defendants, the French shipowners. The defendants gave "up the ship and freight to the shipper, so as that, by the "alleged law of France, the abandonment absolved them from "all further liability on the contract of the master:—*Held*, that "the parties must be taken to have submitted themselves, when "making the charterparty, to the French law as the law of the "ship, and therefore that, assuming the law of France to be as "alleged, the plaintiff's claim was absolutely barred."

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[3] (1865) L.R. 1 Q.B. 115.

That was a decision upon the facts of the case, but the headnote gives support to Mr. Mocatta's submission that one must look, in the first instance, to the law of the country to which the ship belongs. I do not think that it is any more accurate to say that than it is to say that the law of the country where the contract is made must govern.

The Court of Queen's Bench in that case gave judgment for the defendants, on the ground that the power of the master to bind his owners personally was but a branch of the general law of agency, and that the flag of the ship was notice to the plaintiff that the master's authority to bind his owners was subject to the limitation stated in the plea to be imposed by the law of France.

In the Exchequer Chamber the judgment of the court was given by Willes J., who said that the plaintiff must have known that the ship was French. The report sets out the arguments adduced on the two sides [3]: "Upon these facts, it was insisted "for the plaintiff that the decision ought to proceed upon either "what was called the 'general maritime law,' as regulating all "maritime transactions between persons of different nationalities "at sea; the Danish law, as that of the place where the contract "was made ('lex loci contractus'); the Portuguese law, because "the bottomry bond, which in one sense caused the question "to arise, was given in a Portuguese port, and the rule that "the place governs the act ('locus regit actum') was supposed, "therefore, to furnish a solution; or the English law, as being "that of the place of the final act of performance by the delivery "of the cargo ('quasi lex loci solutionis'), in either of which "alternatives the liability of the defendants was established. "And it was argued, that, the charterparty having been entered "into bona fide in the ordinary course of business by the master, "within the scope of his ostensible authority to contract for the "employment of the vessel, which the owner, by appointing a "master and sending him abroad in command, allows him to "assume, the right of the charterer could no more be narrowed "by a provision of foreign law unknown to him than by secret "instructions from the owners, which would clearly be inoperative—a proposition which needs no authority in our law, and "for which French authorities will be found in Paillet's edition "of the Code de Commerce, art. 216, in the note. For the "defendants, it was answered, that by the French law they are

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[3] L.R. 1 Q.B. 115, 119.

"absolved; and that that law, as being that of the ship, governs "the case, either because [of] the character of the transaction "itself, showing that the plaintiff impliedly submitted his goods "to the operation of the law of the ship, or because the master, "who entered into the contract (although his doing so was within "the scope of the authority which he was allowed by the owners "to assume), was disabled by the French law from binding his "owners, otherwise than with the exception expressed or implied "of exemption from liability by abandonment, and that of such "disability, or lack of authority, his flag was sufficient notice."

Thus in that case the argument for the defendants was "the "flag"; on the other side there were several differing submissions. On the facts of that case the court decided in favour of the flag. Willes J. said[4]: "Exceptional cases, should they "arise, must be dealt with upon their own merits. In laying "down a rule of law, regard ought rather to be had to the "majority of cases upon which doubt and litigation are more "likely to arise; and the general rule, that where the contract "of affreightment does not provide otherwise, there, as between "the parties to such contract, in respect of sea damage and its "incidents, the law of the ship should govern, seems to be not "only in accordance with the probable intention of the parties, "but also most consistent and intelligible, and therefore most "convenient to those engaged in commerce."

So far as I have seen, the doctrine of convenience is first mentioned in that case in the year 1865, the same year as the *Peninsular and Oriental* case.

In *Chartered Mercantile Bank of India, London, and China* v. *Netherlands India Steam Navigation Co. Ld.*,[5] the Court of Appeal had to consider this question on an appeal from a judgment of the Queen's Bench Division in favour of the plaintiffs: "The plaintiffs shipped goods on board the defen-"dants' vessel, the *Crown Prince*, under a bill of lading, which "contained exceptions of, amongst other things, 'collision,' and "'accidents, loss, or damage, from any act, neglect, or default "'whatsoever of the pilots, master, or mariners, or other servants "'of the company, in navigating the ship.' In the course of the "voyage the *Crown Prince* came into collision with another "vessel of the defendants, the *Atjeh*. The plaintiffs' goods were "in consequence lost. The collision was due to negligence, for "which the *Atjeh* was mainly in fault; but the *Crown Prince*

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[4] L.R. 1 Q.B. 129.

[5] (1883) 10 Q.B.D. 521.

"also was in some degree to blame:—It was held that the "defendants had not committed a breach of the contract created "by the bill of lading, and that no action could be maintained "against them on the ground of a failure to perform the under-"taking therein contained to carry the goods safely upon the "voyage."

The important part of the report for the purpose of this case is in the judgment of Lindley and Baggallay L.JJ., delivered by Lindley L.J., who said[6]: "The decision of the court below "as regards the law applicable to the case appears to me correct. "The parties to the contract were English, although the master "who signed the bill of lading was a Dutchman. The contract "was in the English language, and was made at Singapore, "which is an English port, and where English law prevails. "The ship sailed under the Dutch flag, and was bound to a "Dutch port, and was commanded by a Dutch captain. As "regards the privileges of trade which the ship might enjoy as "a Dutch ship in Dutch ports, the parties no doubt relied on "the Dutch law, but as regards the construction and effect of "the contract itself as between the plaintiffs and the defendants "there can I think be no doubt that the parties were contracting "with reference to English law, and not with reference to the "law of the country under whose flag the ship sailed in order "to obtain the privilege of trading with Java. This conclusion "is not at all at variance with *Lloyd* v. *Guibert*,[7] but rather "in accordance with it. It is true that in that case the law "of the flag prevailed; but the intention of the parties was "admitted to be the crucial test; and the law of the ship's flag "was considered as the law intended by the parties to govern "their contract, as there really was no other law which they "could reasonably be supposed to have contemplated."

I pause there to say that it was for that reason, because of the passage in the judgment of Lindley L.J., that I read earlier the arguments as adduced and as stated by Willes J. in *Lloyd* v. *Guibert*,[7] Lindley L.J. draws attention to the fact that in *Lloyd* v. *Guibert*[7] there was really no other law which could be applied on the argument except the law of the flag.

Lindley L.J. continued: "The plaintiff there was English, "the defendant French; the lex loci contractus was Danish; the "ship was French; her master was French and the contract "was in the French language. The voyage was from Hayti to

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[6] 10 Q.B.D. 521, 540.

[7] L.R. 1 Q.B. 115.

"Liverpool. The facts here are entirely different and so is "the inference to be deduced from them. The lex loci con"tractus was here English and ought to prevail unless there is "some good ground to the contrary. So far from there being "such ground the inference is very strong that the parties "really intended to contract with reference to English law."

That judgment is claimed by Sir Robert Aske as support for his general proposition, but equally it may be said that there is a strong presumption, or strong inference, that the parties intended the contract on the basis of English law.

The next case to which I would refer is *In re Missouri Steamship Co.*,[8] which reached the Court of Appeal in 1889, when Lord Halsbury was presiding. The headnote reads: "When a "contract is made in one country to be performed wholly or "partially in another, prima facie the contract is to be construed "and enforced according to the lex loci contractus; but the court "will look at all the circumstances to ascertain by the law of "which country the parties intended the contract to be "governed, and will enforce the contract accordingly, unless it "should contain stipulations contrary to morality or expressly "forbidden by positive law. A contract was made in Massa"chusetts, U.S., between an American citizen and a British "company of shipowners, by which the company undertook to "carry certain cattle from Boston to England in a British ship. "The contract contained a clause that the company should not "be liable for the negligence of the master or crew of the ship. "Such a clause is valid by English law, but void by the law "of Massachusetts as being against public policy. The cattle "were lost by the negligence of the master and crew, and the "shipper claimed against the company for the loss. Held "(affirming the decision of Chitty J.) that the contract itself "showed that the parties intended it to be governed by English "law, and that the stipulation exempting the company from "liability through the negligence of their master and crew, not "being immoral or forbidden by positive law but only void under "the law of Massachusetts as being against public policy, would "be enforced by an English court: and the claim was "dismissed."

Lord Halsbury, who decided the case shortly, said[9]: "Now this is a contract for the conveyance of cattle from "Boston to England by sea on board a British ship by a British

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[8] (1889) 42 Ch.D. 321.

[9] Ibid. 336.

"company whose domicile is in England. Those circumstances, "though very strong, would perhaps not be conclusive. But "when I look at the contract itself and find that the ordinary "exceptions to the bill of lading are the Queen's enemies and "so on, it is absolutely impossible to resist the conclusion that "the parties did contemplate being governed by English law in "their contracting relations. If I am to assume that the law of "the United States is that this particular stipulation now in "dispute is of no validity in the United States and cannot be "enforced, when I find that both the parties to the contract "make this stipulation a part of the contract into which they "enter which is of validity in England and can be enforced, and "cannot be enforced in the United States, it seems to me to "follow irresistibly that the contract relations into which the "parties entered were such that they intended to be governed "and regulated by English law; and if that is so the question is "free from doubt."

Fry L.J. said [10]: "Now, in the first place, the ship was an "English ship; the owners were an English company; England "was the place to which the goods were to be brought and the "place at which the final completion of the contract was to take "place; and, what is still more important, the forms of the "contract and the bills of lading were English forms," and the Lord Justice was satisfied that the parties must be taken to have intended that English law should be applied to the determination of any question which might arise under that contract.

In *The Industrie*,[11] the Court of Appeal reversed a decision of Gorell Barnes J. and said that the intention of the parties was to make an English contract. Lord Esher M.R. in the Court of Appeal, said [12]: "This case turns entirely on the one "question whether the defendants are liable to pay certain "freight. The charterparty, which is the contract of carriage, is "in writing, and, therefore, it is for the court to construe it; "and the court, under one set of circumstances, must construe "it according to one set of canons of construction, and, in "another set of circumstances, according to another set. If a "foreign contract is brought before an English court, the court "has to construe that foreign contract, which is in writing, "just as it is the court which has to construe an English con-"tract; but if it is a foreign contract which has to be construed,

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[10] 42 Ch.D. 341.

[11] [1894] P. 58.

[12] Ibid. 71.

C. A.
1953

THE ASSUNZIONE.

Singleton L.J.

"it must be construed according to the canons of construction "used in the country to which the contract belongs, or, as we "say, according to the place where it is made. Therefore, the "first question is this: Is this contract, as a matter of construction, to be construed according to the canons of English "construction or according to the canons of German construction? It is a contract made for the carriage of goods "on board a German ship. Is that conclusive to show that it "is to be construed according to German canons of construction? "It seems to me that that is not conclusive, and that you must look "at a great many more circumstances to see what is the canon "to be applied. The mere fact of its being written in English "will not enable the court to say that it is not a German contract. It might be made with the master abroad for the use "of his ship from one foreign country to another foreign "country, so as to have nothing to do with England at all. If it "were so, and the only fact to rely on was that the contract "was written in the English language, I should think it would "be construed according to the canons of the law of the country "of the ship. It would be made under the flag, just as if it "were made in the country to which the ship belongs. But "where you find a great many other matters come in you "have to consider them. This is, no doubt, a contract in regard "to carriage on board a German ship, but it is made between a "German owner and the proposing English shipper, and it is made "by means of a charterparty in writing, the instrument being "headed with the English words 'charter party.' It is made "in London, the contract is negotiated between two English "houses, the English brokers authorized by the German owner "and the defendants, the shippers, who are English merchants. "It is made on an ordinary English form of charterparty. "Whether an ordinary German charterparty is at all in the form "of an English charterparty I do not know. But this is on an "ordinary form of English charterparty, and every stipulation "in it is an ordinary stipulation in an English charterparty. The "words or phrases used are peculiar to England. One has been "particularly noticed, namely, 'the act of God.' That is an "English phrase, and has an English meaning. I care not "whether there are words in a German charterparty agreeing "with that; but it seems almost agreed that there are not. In "the same way there are the words 'the Queen's enemies.' If "this was a German charterparty, I do not doubt that 'the

C. A.
1953

THE ASSUNZIONE.

Singleton L.J.

"'Queen' would mean 'the Emperor of Germany,' in accord-"ance with the decision in *Russell* v. *Niemann*,[13] but it is a "thing to be taken notice of when you are trying to determine "whether the document is an English or a German document; "and then, when you find the terms used are applicable to "England and not applicable to Germany, it goes a great way "to show that the document is to be construed as English. It "is not, therefore, on any one of the facts I have stated that "reliance is to be placed, but on all of them together. What is "the true inference? In order to see that, you must make up "your mind what must have been the intention of the parties. "You cannot look into the minds of these people; but when you "have two men of business dealing in that way, under such "circumstances, with a contract made in London, between "English brokers and an English firm, who are not supposed to "know German law, but who are supposed to know English "mercantile law; with a contract made upon an English form, "and on a printed form in common use; with a contract made "with nothing but English phrases in it, and with a contract "made with phrases peculiar to English contracts, what infer-"ence can be drawn but that these two people must have meant "that this contract was to be construed according to English "law? All the circumstances together show that the intention "was to make an English contract, and that is all we want."

Later, dealing with the question of freight, Lord Esher M.R. said[14]: "Counsel for the plaintiff wishes to read it thus: "'Payment to be made on right delivery of cargo, if discharged "'in the United Kingdom'; in other words, 'if discharged "'nowhere else.' I cannot read it so. I do not think that is "the right construction. It is freight to be paid on right "delivery of cargo, wherever the destination is. But as to the "mode in which it is to be paid, if discharged in the United "Kingdom it is to be paid in cash as customary, and if dis-"charged elsewhere in cash at the exchange of the day. That "is to say, the freight when due is to be paid in English money. "If it is paid in England it is to be paid, of course, in cash, and "if it is to be paid abroad the payment is to be equal to cash in "England, by reason of its being at the exchange of the day. "Therefore you have now, if that be the true construction, to "construe according to the canons of English construction the

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[13] (1864) 17 C.B.(N.S.) 163.

[14] [1894] P. 74.

C. A.
1953

THE ASSUNZIONE.

Singleton L.J.

"phrase 'freight to be paid on right delivery of the cargo.'" The Lords Justices concurred.

Those are all the older authorites to which I think it necessary to refer. There are two more recent cases where the principles are stated in a way which appears to me to make it unnecessary, or almost unnecessary, to refer to many of the earlier authorities. I have thought it right to consider them in my judgment, partly out of respect for the argument which has been addressed to the court, and partly because it does seem desirable to show, if it be the fact, that none of the tests which have been mentioned can, taken by itself, provide a complete answer in all circumstances.

I will take the second of the two later cases to which I have referred first, *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ld.*,[15] a case in the Privy Council, where Lord Wright, in stating the opinion of the Board, said[16]: "The proper law of the contract "means that law which the English or other court is to apply "in determining the obligations under the contract. English law "in deciding these matters has refused to treat as conclusive, "rigid or arbitrary, criteria such as lex loci contractus or lex loci "solutionis, and has treated the matter as depending on the "intention of the parties to be ascertained in each case on a "consideration of the terms of the contract, the situation of the "parties, and generally on all the surrounding facts. It may be "that the parties have in terms in their agreement expressed what "law they intend to govern, and in that case prima facie their "intention will be effectuated by the court. But in most cases "they do not do so. The parties may not have thought of the "matter at all. Then the court has to impute an intention, or "to determine for the parties what is the proper law which, as "just and reasonable persons, they ought or would have intended "if they had thought about the question when they made the "contract. No doubt there are certain prima facie rules to which "a court in deciding on any particular contract may turn for "assistance, but they are not conclusive. In this branch of law "the particular rules can only be stated as prima facie presump- "tions. It is not necessary to cite authorities for these general "principles. Sometimes their application involves difficulty; but "not in this case. It has been already pointed out that there "are, in their Lordships' opinion, such circumstances as lead to "the inference that in the present case the proper law of the

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[15] [1938] A.C. 224.

[16] Ibid. 240.

"contract is the law of New Zealand, and accordingly that law "should prima facie govern the rights and obligations to be "enforced under the contract by a court before which the matter "comes, a fortiori a New Zealand court."

I take a few lines from the middle of that page, and omit certain words: "Then the court has . . . to determine for the "parties what is the proper law which, as just and reasonable "persons, they ought . . . [to] have intended if they had thought "about the question when they made the contract." That, I believe, is the duty upon us, and in seeking to determine the question we must have regard to the terms of the contract, the situation of the parties, and generally all the surrounding facts.

The other case is *Rex* v. *International Trustee for the Protection of Bondholders A/G*,[17] a case of a different nature, but one in which a like question arose; and Lord Atkin in the House of Lords said[18]: "The legal principles which are to guide an "English court on the question of the proper law of a contract "are now well settled. It is the law which the parties intended "to apply. Their intention will be ascertained by the intention "expressed in the contract if any, which will be conclusive. "If no intention be expressed the intention will be presumed "by the court from the terms of the contract and the relevant "surrounding circumstances. In coming to its conclusion the "court will be guided by rules which indicate that particular facts "or conditions lead to a prima facie inference, in some cases an "almost conclusive inference, as to the intention of the parties "to apply a particular law: e.g., the country where the contract "is made, the country where the contract is to be performed, "if the contract relates to immovables the country where they "are situate, the country under whose flag the ship sails in "which goods are contracted to be carried. But all these rules "but serve to give prima facie indications of intention: they are "all capable of being overcome by counter indications, however "difficult it may be in some cases to find such."

I do not think that for this purpose any distinction is to be drawn between that which Lord Wright spoke of as a prima facie presumption and that which Lord Atkin described as a prima facie inference.

Upon the authorities Sir Robert Aske submitted that it was not possible to spell out of the cases any rule other than that of the place where the contract was made. Mr. Mocatta claimed that no stronger inference could be drawn from the place where the contract was made than from the flag of the country under which the ship sailed; indeed, he submitted that one ought, in the circumstances of this case, to have regard first to the flag which the ship wore, and he relied on the decision in *Lloyd* v. *Guibert.*[19] His main contention was that this was not a case of an inference to be drawn one way or the other; it was a case, he submitted, in which the facts should be weighed, and that if they were weighed, those pointing towards the application of the Italian law weighed down any which could be found pointing the other way.

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[17] [1937] A.C. 500; 53 T.L.R. 507; [1937] 2 All E.R. 164.

[18] [1937] A.C. 529.

Without doubt there are features in this case which appear to point one way, and others which appear to point in another direction. When there are a number of circumstances which have to be considered in deciding which system of law applies, a presumption or inference arising from one alone becomes of less importance. In such a case an inference which might be properly drawn may cancel another inference which would be drawn if it stood by itself. When such a position arises all the relevant circumstances must be borne in mind, and the tribunal must find, if it can, how a just and reasonable person would have regarded the problem. No good purpose is served by saying that the French charterers would never have agreed to the application of Italian law, or by saying that the Italian shipowners would never have agreed to the application of French law, for that would have meant that there would have been no contract; and there is a contract.

I can summarize the facts relied upon fairly shortly. The charterers, who were also shippers under the bills of lading, were a French organization; the contract was entered into by a charterparty which was made in France, after discussions to which I have referred, and the bills of lading were issued in France. The language of the charterparty is English, but no one contends that English law is to be applied. Some support is given to the argument of counsel for the plaintiffs by the bills of lading which are in French, and which contain the particular terms which I have mentioned. Sir Robert relies, too, upon the exchange agreement; upon the fact that in making arrangements for the carriage of the wheat from Dunkirk to an Italian port the charterers were acting in pursuance of what had been agreed between two Government departments. I do not see, in the circumstances of this case, that great help is given by that fact, if it be a fact. Willmer J. said [20]: "It was contended in those circumstances "that that assisted to raise the inference that French law was "intended to be applied. With regard to that latter point, I "am not at all satisfied as to what in fact the status of the actual "charterers was; and if it was intended to rely on their being in "effect the French Government, it seems to me that that is a "fact which ought, if not agreed, to have been proved before "me. Nor am I impressed by this point when I bear in mind "that, according to the agreed statement of facts, the whole of "the background of circumstances, of which this contract of "affreightment merely forms a small part, was quite unknown to "the defendant shipowners. I refer to the fact that this was all "part of an international transaction providing for a loan of grain "between the French and Italian Governments. But, as I say, "that was entirely unknown to the defendant shipowners, and I "do not see, if it be the fact that the charterers are in a sense "some organ of the French Government, how the shipowners "were to be expected to know that; and if they did not know of it "I do not see how that fact can have had any influence at any "rate on their intentions."

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[19] L.R. 1 Q.B. 115.

With that I agree, and I do not think that any question of a Sovereign State being a party to the contract comes into this case.

With regard to the circumstances which support the defendants' contention that Italian law should be applied, I mention these: The ship was an Italian ship owned by two Italians in partnership, and a ship wearing the Italian flag; the owners were Italians; the master was an Italian; the contract was for carriage from a French port to an Italian port; the cargo was to be delivered at an Italian port. It is right to say that loading was at a French port and discharging at an Italian port, and one may appear to cancel the other, but there are further considerations; the charterparty provided that freight and demurrage should be paid in Italian currency. I have read clause 16 of the charterparty; I bear in mind that 80 per cent. of the freight had to be paid in Italy before the ship arrived at an Italian port, and the balance had to be paid at the discharging port. Clause 7 as to demurrage payable in Italian lire, too, is of importance on this part of the case. The next point is that the bills of lading were indorsed by Italian consignees before the arrival of the ship at Venice. The judge thought that that must have been in the contemplation of the parties as the bills of lading were made out to order, by which it must be assumed that indorsement was contemplated.

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[20] [1953] 1 W.L.R. 940.

I would point out that it is seldom, if ever, that there will be one of the elements or tests, and nothing else. If there is one alone, it may be that it would be right to apply the test as to the place of the contract; it may be that if the only one which there is was the flag, that would be the proper test. Willmer J. said[21]: "Giving the best consideration I can to the various "authorities to which I have been referred, it seems to me that "both parties, in putting forward their respective contentions, "have stated their case too high. It is undoubtedly the fact "that the place where a contract is made is a point of very "great importance in considering any contract, whether it be a "contract of affreightment or any other kind of contract. It is "equally clear, I think, that the nationality of the ship concerned (and by that I mean the real nationality of the ship) is "a matter which is obviously of considerable importance in "considering the proper law governing a contract of affreightment. But it seems to me that it is putting it too high to say "that the place where the contract is entered into is the fact "which promotes the 'primary inference,' which was the "expression used by Sir Robert Aske in his argument on behalf "of the plaintiffs. Equally, I doubt whether it is possible to "say in these days that the flag of the ship, or, indeed, the "nationality of the ship, raises anything in the nature of a "presumption."

It may be that in the words the judge used in the last line he overlooked the tests stated both by Lord Wright and by Lord Atkin in the passages that I have read: that you must come down on the side of the flag if there is nothing pointing in an opposite direction. It is a position which can seldom arise. If a contract of affreightment is made in one country for shipment of goods in a ship wearing a flag of another country, different considerations arise at once; there is the place where the contract was made; and a different flag, a flag of a country other than that in which the contract was made. Those are matters for consideration, and so are the terms of the contract. Although I believe it to be impossible to state any rule of general application, I feel that matters of very considerable importance are the form of, and place of, payment. In this case payment had to be made in Italian lire, and in Italy. In the circumstances of this case I regard it as a very important feature, coupled as it is with the facts that the ship was an Italian ship and that the destination was an Italian port.

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[21] [1953] 1 W.L.R. 937.

There are two other authorities of recent date to which we were referred, one a decision of Langton J., in which he put forward convenience as a test, and the other a decision of the President in the year 1936 in which he placed emphasis upon a decision according to business efficacy. It seems to me that both those decisions are completely in line with the general proposition which I have sought to state, and which is taken from the words of Lord Atkin and of Lord Wright: one must look at all the circumstances and seek to find what just and reasonable persons ought to have intended if they had thought about the matter at the time when they made the contract. If they had thought that they were likely to have a dispute, I hope it may be said that just and reasonable persons would like the dispute determined in the most convenient way and in accordance with business efficacy.

Applying the rule which I have stated, and weighing all the facts to which attention was directed, I am satisfied that the scale comes down in favour of the application of Italian law, and that the decision of Willmer J. was right. In my opinion, the appeal should be dismissed.

I would not like to leave this case without thanking counsel for the help they have given us. In particular I would like to say what a pleasure it has been to listen to the argument of Sir Robert Aske, which has been of great help to each of us, an argument in which he stated the facts with great clarity, and in which, from his unrivalled knowledge of this subject, he dealt with a large number of authorities in a way which commanded, if I may humbly say so, my admiration.

BIRKETT L.J. I am of the same opinion. Although all the relevant questions in this case have been fully considered by my Lord, out of respect to the arguments of counsel I will venture to add a very few words, though, of course, I cannot hope to add anything that has not been referred to and touched upon in the judgment of my Lord.

The issue in this appeal was: what was the law to be applied to this particular contract of affreightment?, the plaintiffs contending that the law applicable should be the French law; the defendants contending that the law applicable should be the Italian law. There has been no contention raised in this court that any other law needs to be considered, although I did observe in the correspondence that the owners of the cargo at one time asked the shipowners whether they would be content to have all the matters in dispute determined by English law; but so far as the correspondence was concerned, there never was an answer to that question. The only question, therefore, which was argued before us was the simple question: did the French law apply, or did the Italian law apply?

The principle upon which that kind of question has to be determined is really not in doubt; it has been laid down in a long line of cases. If the intention of the parties is not expressed in the contract itself, the court must ascertain as best it can what is the implied or the presumed intention to be gathered from the whole of the facts in the circumstances of the case after they have been fully considered. The real controversy in this appeal has never centred upon the question of principle, but upon the method to be employed in applying that principle to the facts. It was said that in the course of time, and certainly from the year 1865, certain rules have been evolved by which this kind of question is to be determined, and we have been referred to those rules and to many cases concerned with those rules: the rule concerning the law where the contract is made; the rule which is founded on the law of the flag; the law concerning immovables; the law of the place of performance, and so on; and in this case it has really been a contest between two of those, namely, the rule which is founded upon the law of the place where the contract is made, and the rule which is founded upon the law of the flag. Those have been the two matters which have really been in contest, but I think myself that it is clear from a consideration of all the cases, many of which have been cited by my Lord, that none of those rules is in any sense conclusive at all of itself. They may be displaced in any given case by a clear intention to be gathered from an examination of the facts and the circumstances of the case; and if the question has to be put in this way—in examining the facts and circumstances of this case how would just and reasonable men have been supposed to declare their intention?—then, of course, the facts assume the greatest possible importance; and, indeed, none of the rules or the presumptions could arise unless the facts in the case enable them to arise at all.

Sir Robert Aske placed the greatest reliance upon the first fact that the charterparty bears upon its face the words "Paris, "October 7, 1949," and thereupon he says that when one examines all the other facts in the case, that fact is one of supreme importance; and, moreover, that it gives rise to this presumption, that the contract being made in France and the charterparty bearing upon its face the word "Paris," that should be the chief, the dominant, and the primary consideration in the case. Mr. Mocatta attacked that proposition with some force. First of all he said (and I am inclined to agree with him) that it cannot be said in any true sense of the meaning of the words that the contract was made in France. It cannot be denied that the charterparty bears on its face the word "Paris," but that is a long way from saying that the contract itself was made in France, and he referred to the correspondence where the French and the Italian brokers were discussing the terms; and I think that it is a fact of some significance at least that one of the terms which was inserted in the correspondence when the parties were negotiating the contract was that the contract, the Universal and General Charter of the Baltic and White Sea Conference—the Gencon as it is termed—should be in that form; and it is quite clear from the charterparty, which bears the name of Azerad, that the Gencon form was a common form that was employed in charterparties of this nature; but I think that Mr. Mocatta was right in saying that it is too much to say that the contract was made in France, because the correspondence would seem to indicate that all the material matters were negotiated by letters and by telegrams passing between Genoa and Paris. This is a little singular: the matters of controversy which have arisen in this case, of course, could never have arisen had not there been the exchange agreement, and it is to be observed that that exchange agreement is headed "Rome-Paris," and it is, according to my copy, a translation from the Italian. That agreement, however, does refer (and I want to mention this a little later) to the Governments, and article 6 states how differences of opinion or conflict which may arise are to be determined: if they are of a technical and material order they are to be settled amicably between O.N.I.C. and Federazione, and if an amicable agreement is not possible they will accept arbitration, but any difference not foreseen is to be settled through diplomatic channels. So they certainly had in mind that difficulties might arise, but as far as the parties in this matter are concerned, it is quite clear that they never gave any attention at all to this question, "what will be the law if differences arise "between us?" I think that the force of Sir Robert's argument about "Paris" appearing upon the charterparty is greatly weakened if one looks at the history leading up to it. I accept fully what Sir Robert submits, that there is not a complete and binding contract until the charterparty exists, but a consideration of the correspondence which passed between Genoa and Paris shows that it is almost an accidental circumstance that the word "Paris" appears upon the charterparty, and I do not think for my own part that it does play that exceedingly important and dominant part which Sir Robert claimed for it. He said that that was his first point, that the law of the place of the contract, the lex loci contractus, governed the matter.

Next he said that unless there was something in the other facts which displaced that primary presumption, the answer should be that the law of France ought to apply. He went on further to discuss many other matters. The charterparty, he said, although in the English tongue had a very important supplement in the French language, and he attached importance to that as a factor to be considered.

Then he drew attention to the fact that the bills of lading were in the French language, and to the sentence which my Lord has emphasized, which he said was peculiarly French phraseology, and that therefore particular emphasis should be laid upon that as a factor in the case when one was deciding which law was to apply.

The next point which he raised struck me as being one of very great importance. He was seeking to say: this is a contract made by a Sovereign State, and when a Sovereign State enters into a contract it is a very strong thing to say that an intention can be presumed that that Sovereign State would be content to be bound by a law other than its own, when it is quite clear that the plaintiffs, as the agreed statement of facts alleges, on October 7, 1949, in Paris agreed, in pursuance of their obligation, to make restitution under the exchange agreement. The people who were to make restitution were, of course, the French Government. The Italians had sent over their wheat, and it was part of the bargain that the French Government in their turn would make restitution without profit or without loss; but in the agreed statement of facts the words appear "... the plaintiffs, in pursuance "of their obligation to make restitution under the said exchange "agreement, entered into a charterparty. . . ." Whatever the solution of that matter may be, there are certain words of Lord Atkin which seem to me to bear very strongly upon this matter. After the passage which my Lord cited in *Rex* v. *International*

Trustee for the Protection of Bondholders A/G,[22] Lord Atkin continued [23]: "The principle of law so stated applies equally to "contracts to which a Sovereign State is a party as to other "contracts," and that law was the law which my Lord read from the citation.

Lord Atkin then considered two cases in which Branson J. and the Court of Appeal had considered this very matter of the Sovereign State and the law to be applied. I do not need to read it or to analyse it, but after discussing those cases at some little length, Lord Atkin continued [24]: "It would appear therefore that "these cases afford little authority for the proposition. In "principle it must be ill-founded. It cannot be disputed that a "Government may expressly agree to be bound by a foreign law. "It seems to me equally indisputable that without any expressed "intention the inference that a Government so intended may be "necessarily inferred from the circumstances: as where a Govern-"ment enters into a contract in a foreign country for the purchase "of land situate in that country in the terms appropriate only to "the law of that country: or enters into a contract of affreight-"ment with the owners of a foreign ship on the terms expressed "in a foreign bill of lading, or employs in a foreign country "foreign labour in circumstances to which foreign labour laws "would apply. It appears therefore that in every case whether a "Government be a party or not the general principle which deter-"mines the proper law of the contract is the same: it depends "upon the intention of the parties either expressed in the contract "or to be inferred from the terms of the contract and the "surrounding circumstances, and in the latter case the inference "may be drawn that the parties intended a foreign law to "apply."

The circumstance that a Government is a party is entitled to great weight in drawing the proper inference, but it is not conclusive and it is only one factor of the problem. As the plaintiffs were the agents of the Sovereign State, acting for the Sovereign State, I think that the principle of law laid down by Lord Atkin applies, and the fact that one party is a Sovereign State, or one of the parties is acting for a foreign State, is a factor of importance, but only a factor, in considering the final decision to be made.

Mr. Mocatta did two things. First of all he attacked the force of the facts which had been raised by Sir Robert, and then he

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[22] [1937] A.C. 500.

[23] Ibid. 529, 530.

[24] Ibid. 531.

C. A.
1953

The Assunzione.

Birkett L.J.

raised facts of his own, which he said pointed to Italian law as being the law which presumably would be the intention of the parties, and the first matter upon which he relied was that the *Assunzione* was a bona fide Italian ship; it had an Italian master, and although there was no real evidence about it, it was said that presumably it had an Italian crew; but however that may be, it was undoubtedly an Italian ship with an Italian master, and he put that in the forefront of the facts to be considered from his point of view. Then he said (although for my own part I did not think that this had the weight of some of the other considerations) that the contract was to carry French goods from a French port to an Italian port, and to discharge the goods at the Italian port. It is a fact that the Italian ship carrying the French goods under this contract of affreightment naturally loaded the goods in France, and naturally discharged them in Italy.

He next raised a point which, I venture respectfully to agree with my Lord, is a factor of very real importance. The charterparty provided that the freight and the demurrage charges (if any) should be paid in Italy at Naples, and my Lord read clause 16 of the supplementary clauses of the charterparty. These clauses did not form part of the standard form Gencon, as I understand it, but one or two supplementary clauses, including clause 16, were put in, which made this particular provision which my Lord read; and it is to be observed that in the charterparty there appear these words: "and there deliver "the cargo on being paid freight—on intaken quantity—as "follows: 1,980 Italian lire per metric ton, if West Coast Italy, "2,205 Italian lire per metric ton, if Adriatic Coast Italy." The charterparty itself laid down Italian coinage, Italian money, as the means whereby the freight was to be paid for, and my Lord has already referred to other clauses bearing on that matter.

Mr. Mocatta points out that whilst it cannot be denied that the words "Paris, October 7," appear in the charter, yet they appear in such circumstances that what might be called the ordinary presumption which might in proper circumstances arise, does not really arise here when one considers the history of the negotiations which led up to the signing of the charterparty.

As regards the matter of the bills of lading, which were in fact indorsed by the Italian holders before presenting them to the ship, Mr. Mocatta said that that cannot be denied, but that it must reasonably have been in the contemplation of the parties at the time of the signing of the charterparty. That met with the severest condemnation from Sir Robert, who said that it was quite inconceivable, in the facts and circumstances set out, that any such thought would be in the minds of the people preparing this contract.

Perhaps I have said enough to show that upon both sides there were many facts and many surrounding circumstances, and, as my Lord said, some point in one direction and some point in the other.

It was said on the one side by Sir Robert that the governing matter is always the lex loci contractus; there it is: "Paris, "October 7"; that there is nothing else which can disturb that primary inference, and that the answer ought to be that it is French law which applies. Mr. Mocatta said that there is an Italian ship; an Italian master; payment in Italian money; the prospect of disputes arising being settled in Italy or fought in Italy; and that therefore the conclusion ought to be that the law of the flag of the ship, Italian, applies.

In this very conflicting state of affairs where there are so many facts, many of them conflicting, I think that the duty of the court is to examine all these facts and to see, if it is possible, what must have been the presumed intention of the parties. It is said that if they are so evenly balanced that one really cannot make a decision, if the facts on one side really cancel out the facts on the other, then apply the law of the flag, that of Italy. Mr. Colinvaux even went the length of saying that the facts here were evenly poised, and that that is how one ought to decide the matter; whereas, as I understand him, Sir Robert continued to say from first to last that one should start with the presumption that the lex loci contractus applies; and that then one should balance the facts one way or the other to see if that primary presumption has been displaced.

I think for my own part that so far as the facts and circumstances here are concerned, on balance the indication is that the answer should be that it was Italian law which was reasonably supposed to be in the minds of the parties, if they had ever considered the matter, as the law which should govern this matter.

I would end with this observation: I have been confronted from the very beginning of this case with a sense of unreality. If parties do express in their contract the law by which they desire the contract to be governed, well and good; but if, as in this case (and I rather gather in the majority of cases) no thought whatever is given to it, and it is said to a court, "You have to "discover and ascertain, if possible, what it would have been "if these people had really considered it," then this situation arises, Sir Robert saying with great force: "I cannot conceive "the plaintiffs in this case ever agreeing to Italian law under "any circumstances," and Mr. Mocatta saying with equal force: "In view of the matters which I have put forward, I "cannot conceive the defendants in this case ever accepting "French law." One side urges French law, the other Italian law; but, of course, no one has said expressly which is to apply, and this court has therefore to examine the facts of the case and to consider what inference or presumption arises from those facts, and then, regarding the parties as just and reasonable people, to say after that full consideration what is the reasonable inference to be drawn and what was the probable intention of the parties.

Although I differ in some small matters from the judgment of Willmer J., which are immaterial for this purpose, on the whole I think that that judgment ought to be affirmed.

HODSON L.J. I agree with the conclusion of the judge that the proper law of the contract to be applied in this case is the Italian law, having regard to the terms of the contract and the relevant circumstances.

The judge, having considered the agreed facts and documents, based himself on certain salient matters, putting in the forefront that the ship in question was a genuine Italian ship in the full sense of the word; that she was engaged in pursuance of a charterparty on a voyage to an Italian port; that by the charterparty freight and demurrage, if any, had to be paid in Italy and in Italian lire; that upon the arrival of the ship at Venice there was a likelihood that the bills of lading would be presented by Italian holders, which, indeed, was what happened; and he also relied on the fact that any claims likely to arise would probably be claims by Italian holders of the bills of lading against the Italian ship, and that Italy was the place in which the owners could be found if the ship could not be arrested, so that Italy was the place where the owners could be sued.

The plaintiffs have criticized the judgment not only because Willmer J. treated as negative such inference as ought to be drawn from the place where the contract was made, namely, France, but also because he left out of account the exchange agreement which had been entered into by a department of the French Government and a department of the Italian Government preceding the charterparty. I think that the judge was right in excluding the exchange agreement from consideration in the construction of this contract upon the ground which he stated; namely, that in order to arrive at the mutual intention of the parties to a contract it was not legitimate to look at a matter which was outside the knowledge of both parties and here only within the knowledge of one, it being common ground that the defendants were unaware of the exchange agreement.

Sir Robert Aske has complained that the judge has wrongly taken into account the rights of third parties, namely, holders of the bills of lading. In my judgment, the judge was right upon that for a reason which applies, perhaps, only to this particular case: that it was contended by both parties that, according to continental law, either French or Italian, the contract in this case was not contained in the one document, namely, the charterparty, as it would be under English law, but was, for the purpose of either law, enshrined not only in the charterparty but also in the bills of lading. That being the case, it is surely legitimate to look at what is likely to happen to the bills of lading as being in the contemplation of the parties, and putting out of mind the provisions of the exchange agreement (as I think one is bound to do) I take the view that it must have been contemplated that the bills of lading would be presented to the ship by some Italian organization upon her arrival in Italy. In my judgment, the judge did not leave out of account anything which he ought to have taken into account, or take into account any matter which he should not have taken into account in arriving at his conclusion.

Battle was joined here on a familiar academic field, one party contending for the lex loci contractus, namely, France, and the other party contending for the law of the flag. The judge felt himself able to come to his conclusion without reliance on any presumption raised by either law. On the one hand he rejected the argument of the charterers that the place where the contract was entered into promotes a primary inference. On the other hand, as regards the presumption said to be raised by the law of the flag he said[25]: ". . . I doubt whether it is possible to "say in these days that the flag of the ship, or, indeed, the "nationality of the ship, raises anything in the nature of a "presumption. The authorities in support of any such proposi-"tion are old, and, . . . they are mostly concerned with cases "arising from acts of the ship's master in a port of distress."

As to the rival contentions jointly the judge said: "It seems

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[25] [1953] 1 W.L.R. 937.

"to me, therefore, that the ship's flag or nationality and the "place where the contract is made are no more than circum-"stances which the court must take into consideration, together "with all the other circumstances of the case, in order to arrive "at the right inference as to what intention ought to be imputed "to the parties."

The question has been argued fully before us, and I, for my part, have come to the conclusion, as the authorities stand, that it is not right to treat the law of the flag in connexion with contracts of affreightment as if it were obsolete.

In *Rex* v. *International Trustee for the Protection of Bondholders A/G* [26] the legal principles which are to guide an English court on the question of the proper law of the contract are set out by Lord Atkin as follows [26]: "In coming to its conclusion "the court will be guided by rules which indicate that particular "facts or conditions lead to a prima facie inference, in some cases "an almost conclusive inference, as to the intention of the parties "to apply a particular law: e.g., the country where the contract "is made, the country where the contract is to be performed, if "the contract relates to immovables the country where they are "situate, the country under whose flag the ship sails in which "goods are contracted to be carried."

Since every contract must be made in a place, the references to the country where the contract is to be performed, if the contract relates to immovables to the country where they are situate and to the country under whose flag the ship sails in which goods are contracted to be carried, would appear to me to indicate that, in the opinion of Lord Atkin, these are exceptions to the general law of contract, that the lex loci contractus ought to prevail. In my judgment this understanding of Lord Atkin's speech is consistent with the authorities. In *Lloyd* v. *Guibert* [27] Willes J. laid down the rule as to the law of the flag in no uncertain terms. It is unnecessary for me to read again the well-known passage from his judgment, but it is to be observed that Willes J. was purporting to lay down a rule, and he pointed out [27] that the intention is to be inferred from the subject-matter and from the surrounding circumstances so far as they are relevant to construe and determine the character of the contract. Willes J. continued: "The present question"—that is the question now under consideration—"does not appear to have ever "been decided in this country." I should like to draw attention to the following passage in his judgment[28]: "The cases which "we have thus put are not extreme nor exceptional; on the "contrary, they are such as would ordinarily give rise to the "question, which law is to prevail? The inconvenience and even "absurdities which would follow from adopting the law of the "place of contract in preference to that of the vessel, are strong "to prove that the latter ought to be resorted to."

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[26] [1937] A.C. 500, 529.

[27] L.R. 1 Q.B. 115, 123.

A little further on Willes J. set out the rule which he sought to lay down in full. It is to be observed that no qualification is made to the rule, which is said to be based on convenience, perhaps because on a round voyage where cargo is being picked up at various ports and a contract may spring up at a number of places, the law of the flag which the ship wears is more obviously appropriate than any other. Sir Robert Aske sought to treat the authority of *Lloyd* v. *Guibert*[29] in two ways. First, he said that it is one of those cases which arose out of the acts of the master when the ship was in distress, and that the law of the flag admittedly applies where the master is authorized to deal with the cargo and ship in the interests of one or both, but that in other cases the rule has no application. For my part I do not think that the consequences of the decision in *Lloyd* v. *Guibert*[29] can be avoided in that way. It is true, as part of the history of the case, that there was such an incident; the master had entered into a bottomry bond, but the actual decision in the case was given upon a contract of affreightment and had nothing to do with the agency or necessity of the master, and I cannot for myself take such a limited view of the decision in *Lloyd* v. *Guibert*,[29] nor, indeed, do I think that it has been so treated in later authorities.

Secondly, Sir Robert Aske relied on as part of his argument the following dictum of Lindley L.J. in *Chartered Mercantile Bank of India, London and China* v. *Netherlands India Steam Navigation Co. Ld.*[30]: "The lex loci contractus was here English "and ought to prevail unless there is some ground to the con-"trary." That dictum, taken out of its context, does, at first sight, seem to be inconsistent with the rule laid down in *Lloyd* v. *Guibert*,[29] but I do not think that that dictum ought to be treated as throwing any doubt on the validity of the rule. It is clear that Lindley L.J. was not seeking to impute the validity of the opinion expressed in *Lloyd* v. *Guibert*,[29] a decision which was binding upon the Court of Appeal then and is binding now;

[28] L.R. 1 Q.B. 128, 129.

[29] L.R. 1 Q.B. 115.

[30] 10 Q.B.D. 521.

C. A.
1953

THE ASSUNZIONE.

Hodson L.J.

and, moreover, as Willmer J. pointed out, in that case there was really not room for any other decision than that the ship in question, although wearing the Dutch flag, was in fact the property of an English company composed of English nationals, and there is nothing in the decision in that case which throws any doubt upon the validity of the rule. It is only that dictum taken in isolation, especially by such a master of the law, that really lays any foundation for any attack upon the rule. There was no reality about the Dutch nationality of the ship in that case, whereas in the present case the vessel was in all respects an Italian vessel and not merely a ship wearing the Italian flag. There is nothing, I think, in the judgments of the other members of the court, only one of whom, Brett L.J., delivered a separate judgment, which casts doubt upon the existence of the rule.

Attention was drawn to *Peninsular and Oriental Steam Navigation Co.* v. *Shand.*[31] I propose to say no more about it than this, that it was noted in *Lloyd* v. *Guibert,*[29] and not regarded by Willes J. as an authority, or even a persuasive authority, which prevented him from laying down the rule which he did. Moreover, it was a case in which the law of the flag was applied as well as the law of the place of the contract, and, indeed, I confess that it does seem to me that it should be treated as if it were a case which did not concern a contract of affreightment at all.

Scrutton L.J. in his book on Charterparties (15th ed., p. 1) defines a contract of affreightment as follows: "When a ship-"owner, or person having for the time being as against the "shipowner the right to make such an agreement, agrees to "carry goods by water, or to furnish a ship for the purpose "of so carrying goods, in return for a sum of money to be "paid to him, such a contract is called a *contract of affreight-"ment* and the sum to be paid is called *freight.*" It seems a little strange, in the light of this definition, to regard the contract which a passenger enters into with a company for the carriage of his luggage as a contract of affreightment. The same view of the matter seems to have been taken by Professor Dicey, who included in his Conflict of Laws a separate rule, which now appears (6th ed.) as rule 148, dealing with a contract for the carriage of persons or goods from a place in one country to a place in another, which is presumably governed by the law of the place where it is made. That is how the rule stood originally, but the editors of the recent edition have added the words: "but this does not "apply to contracts of affreightment," drawing a distinction between such cases as the *Peninsular and Oriental Steam Navigation Co.* v. *Shand* [31] and cases dealing with ordinary contracts of affreightment.

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[31] 3 Moore P.C. (N.S.) 272.

[29] L.R. 1 Q.B. 115.

Other decisions of the Court of Appeal, namely, *In re Missouri Steamship Co.*[32] and *The Industrie* [33] were relied upon, but neither of those cases casts doubts upon the existence of the rule in *Lloyd* v. *Guibert* [34] as such, and in the former case Lord Halsbury used language which tends to support it, and which, indeed, is relied upon by the defendants in this case. Lord Halsbury said in *In re Missouri Steamship Co.*[35]: "Now this is "a contract for the conveyance of cattle from Boston to England "by sea on board a British ship by a British company whose "domicile is in England."

In that case at first instance Chitty J. based himself upon the law of the flag, the contract having been made in Massachusetts, the ship being an English ship, and the Court of Appeal unanimously upheld his decision, although it is true that they did not in terms refer to the law of the flag. They said nothing to indicate that Chitty J. was wrong, and the Lord Chancellor, who delivered the leading speech, put in the forefront the passage which I have quoted. Cotton L.J. ended his judgment by saying [36]: "In my opinion the judgment of Chitty J. was right, "and the appeal fails." Fry L.J. in his judgment said [37]: "Now, "in the first place, the ship was an English ship." No doubt there are dicta in that case which can be used by Sir Robert to support his own contention that the law of the place, lex loci contractus, prevailed, but I see nothing in that case, as I read it, to weaken my belief that the rule which is under discussion still exists.

As far as *The Industrie* [38] is concerned, the same comment applies. Lord Esher M.R., after discussing the circumstances in which a foreign contract is brought before an English court, and the duty of the court in those circumstances, said with regard to the contract in that case [38]: "It is a contract made for the "carriage of goods on board a German ship. Is that conclusive "to show that it is to be construed according to German canons "of construction? It seems to me that that is not conclusive,

[31] 3 Moore P.C. (N.S.) 272.

[32] 42 Ch.D. 321.

[33] [1894] P. 58.

[34] L.R. 1 Q.B. 115.

[35] 42 Ch.D. 336.

[36] Ibid. 340.

[37] Ibid. 341.

[38] [1894] P. 58, 72.

" and that you must look at a great many more circumstances to " see what is the canon to be applied."

That seems to me to be the result of all the authorities, and that paragraph certainly does nothing to destroy the view that the fact that the goods were to be carried on a German ship raised a presumption, not a conclusive presumption, but one which could be rebutted, and was, indeed, held to be rebutted in that case. At first instance, Gorell Barnes J. had applied the law of the flag, the ship being a German ship; he held that German law applied; but the Court of Appeal arrived at a different conclusion, having given great weight to a particular circumstance which differentiates *The Industrie* [38] from the present case.

In many respects *The Industrie* [38] was similar to the present case, but it was unlike it in one significant respect: the contract was not only made in London, but also negotiated in London between the English brokers, authorized by the German owners, and the defendants, the shipowners, who were English merchants. The contrast with this case is that here, although the contract was made in France, it was negotiated at the one end in Italy and at the other end in France. There seems, accordingly, to be a very marked distinction on the facts between the two cases.

The Adriatic,[39] a decision of Langton J., is, I think, of considerable interest. Langton J. cited [39] from Professor Dicey's Conflict of Laws, 4th ed.: " Subject to the exception hereinafter " mentioned, the effect and incidents of a contract of affreight- " ment (i.e., a contract with a shipowner to hire his ship, or part " of it, for the carriage of goods) are governed by the law of the " flag. Provided that the contract will not be governed by the law " of the flag if, from the terms or objects of the contract, or from " the circumstances under which it was made, the inference can " be drawn that the parties did not intend the law of the flag to " apply."

Langton J. continued [39]: " Now that is a statement as to a " presumption that the law of the flag will apply unless the " evidence shows that the parties intended something else. . . . " That, I think, states the presumption of law as accurately as " it can be stated, and what I have to determine here is whether " in all the circumstances (and I am entitled and indeed bound " to look at all the surrounding circumstances) there is evidence " to show that the intention of the parties was to displace that " prima facie presumption."

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[38] [1894] P. 58.

[39] [1931] P. 241, 246.

Attention has been drawn to the rule as it now stands (it has been altered) in which the emphasis has been shifted, but which is to the same effect. That rule follows preceding rules concerning other contracts of a special nature as exceptions to the general rule of contract, the general rule being that the law of the place where the contract is made prevails.

A modern case to which reference was made was *The Njegos*,[40] a decision of the President in which he also clearly recognized the existence of that rule. After referring to *The Industrie*,[41] Lord Merriman P. said[42]: "Lord Esher's judgment "in this last case seems to me to be particularly valuable "as showing what are the real limits of the presumption in "favour of the law of the flag in connexion with a contract of "affreightment. It seems quite plain that, in connexion "with such contracts as the master may be driven to make by "necessity in the course of the voyage, the law of the flag should "prevail, for it is that law which governs his relations with his "owners; but that, as is pointed out by Lord Esher, is by no "means inconsistent with the proper law of the contract of "affreightment being a different law. In my opinion all these "cases show very clearly that, as regards the contract of "affreightment as a whole, there is no necessary presumption "that the law of the flag applies."

I emphasize the word "necessary," for in no way did the President deny the existence of the presumption. He noticed the necessity of applying the rule in cases where ships were in distress, and considered that there was a lesser weight to be attached to it in other cases.

With regard to the last two cases I would add that both judges used expressions which have been commented on in this case. Langton J. referred to convenience, and the President referred to business efficacy, which seems to me to amount to very much the same thing, and it was suggested that this was a new departure and something which could not be justified on the authorities. In my opinion this is not so, and the doctrine of convenience as a guide and help in these matters traces back to *Lloyd* v. *Guibert*[43] itself, which is the fount of so much discussion and learning on this subject.

In my judgment, the position is that the rule or presumption must, indeed, often be of little importance in the decision of cases, because the court addresses itself, and always must, to

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[40] [1936] P. 90.

[41] [1894] P. 58.

[42] [1936] P. 90, 106, 107.

[43] L.R. 1 Q.B. 115.

C. A.
1953

THE ASSUNZIONE.

Hodson L.J.

the presumed intention of the parties to the contract, and will act on the evidence before it and will naturally be loath to depend on presumptions which necessarily vary in weight, some being more easily overcome than others. This is not, however, to say that a particular rule or presumption has ceased to exist, and, in my opinion, the presumption contended for by the defendants is available to them, if only as a last resort, when the evidence is so evenly balanced that the court cannot otherwise reach a fair and just conclusion.

For this reason, therefore, in addition to those given by Willmer J. and my Lords, I think that Willmer J.'s conclusion was right, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Clyde & Co.; Crawley & de Reya.*

H. G.

1953
Dec. 2.

Collingwood J.

S—— (D. A.) *v.* S—— (J. D.).

Husband and Wife—Maintenance—High Court—Wilful neglect to maintain—Alimony—No power to grant alimony pending suit—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 19 (1), 20 (1), 22 (1), 23; *Matrimonial Causes Rules,* 1950 (*S.I.* 1950, *No.* 1940), *r.* 56.

Husband and Wife—Alimony pendente lite.

Except for the powers of a judge under rule 56 (10) of the Matrimonial Causes Rules, 1950, to make an interim order, the court has no power to make an order for alimony pending suit in proceedings brought by a wife under section 23 of the Matrimonial Causes Act, 1950, on the ground of an alleged wilful neglect to maintain.

Welton v. *Welton* [1927] P. 162; 43 T.L.R. 174 considered.

APPEAL from a decision of the registrar of the district registry, Birmingham, who on November 12, 1953, dismissed the wife appellant's application for an order for alimony pending suit in proceedings brought by her under section 23 of the Matrimonial Causes Act, 1950.

The following statement of facts is taken from the judgment: The appellant, Dorothy Annie " S ", of West Bromwich, was

1953

S—— (D. A.)
v.
S—— (J. D.)

the wife of James Douglas "S", and on June 23, 1953, she issued an originating summons under section 23 of the Matrimonial Causes Act, 1950, on the ground that her husband had wilfully neglected to provide reasonable maintenance for her. The respondent husband was employed at Lagos, in British West Africa, and because of this some delay in the proceedings became inevitable. On October 14, 1953, the wife accordingly gave notice of an application to the court for an order that the husband pay her a weekly (or monthly) sum in respect of alimony pending suit. Her application was heard by the district registrar, Birmingham, on November 12, 1953, and he dismissed it on the ground that there was no power in the court to make the order for which she asked. The wife appealed.

George Heron for the wife appellant.

A. A. Shenfield for the respondent husband.

Argument was heard in chambers in Birmingham.

Cur. adv. vult.

Collingwood J., reading his judgment, said: It was submitted on behalf of the appellant wife that the power to make such an interim order was given by the Matrimonial Causes Rules, 1950. It was contended that the effect of rule 56 (10) and (16) was to give the same power to the court as if this application were a matrimonial cause, as if the originating summons were a petition and the applicant were the petitioner.

By rule 56 (16): "The provisions of rules 9, 10, 11, 12, 13, "14, 23, 32, 35, 36, 69 and 70 shall apply to an application "under this rule as if it were a matrimonial cause and as if the "originating summons were a petition and the applicant were "the petitioner." None of these rules, however (rules 9 to 70 as set out in the rule) has any bearing on the present application.

Rule 56 (10) provides: "On the hearing of the application "the judge may make such order as he thinks fit, or may refer "the application to a registrar for an investigation into the "means of the parties to the marriage and, pending the final "determination of the application, the judge may make an "interim order upon such terms as he may think just." The power to make an interim order under this rule is clearly confined to a judge, and is given to him only when, at the hearing of the application under section 23, he decides to refer the matter to a registrar for investigation into the means of the parties. I find no other provision in the rules which confers on a judge the power to make an interim order in any other circumstances, and no provision which confers such power on anyone other than a judge.

It was further contended that, apart from the rules, the court had an inherent power to order such payments, and in support of this contention I was referred to *Welton* v. *Welton*.[1] In that case the wife was suing for divorce on the ground of her husband's adultery, and pending suit she applied for and obtained in the registry an order for alimony. The respondent husband appealed, on the ground that in a previous suit, in which he was petitioner, the wife had been found guilty of adultery; and it was contended on his behalf that the court had no jurisdiction to grant alimony pendente lite to a wife who had been so found, and that this was so despite the fact that the husband's petition had been dismissed on the ground that he had been guilty of conduct conducing to the wife's adultery. In the course of his judgment on the husband's summons to rescind the registrar's order, Lord Merrivale P. said[2]: " So long as a " wife was a competent suitor in the Ecclesiastical Court in a " matrimonial cause the general practice of those courts was " to require the husband to make provision according to his " means for her maintenance and the costs of her suit. I know " of no ground for doubting the accuracy of the statement on " this subject contained in Oughton's Ordo Judiciorum, Tit. 206, " 207." In the hearing in the Court of Appeal Lord Hanworth M.R. said[3]: " If, therefore, she is, as I agree with the President " she is, a competent suitor, it appears to me that section 190 (3), " [of the Supreme Court of Judicature (Consolidation) Act, 1925] " comes into play, and that giving full weight to the limitation " imposed by section 22 it is necessary for the court to bear " in mind the effect of section 31, and in those circumstances to " say that there was power in the court to make an order for " alimony pendente lite at a time when the measure or quality " of the wrong to be imputed to the husband and to the wife " has not been finally determined between them. It appears to " me, therefore, that the first ground on which the case has " been argued fails."

It was submitted that in the present case the wife was " a " competent suitor in a matrimonial cause " and, therefore, that the husband could be ordered to pay alimony pendente lite. The question with which the court was concerned in *Welton* v. *Welton*[4] turned on the effect of section 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925. That section provided: "On any petition for divorce or nullity of marriage "the court shall have the same power to make interim orders "for the payment of money by way of alimony or otherwise to "the wife as the court has in proceedings for judicial separation."

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[1] [1927] P. 162; 43 T.L.R. 174.

[2] [1927] P. 162, 169.

[3] [1927] P. 162, 177.

The contention on behalf of the appellant husband in that case was: (1) that a suit for divorce a mensa et thoro by a guilty wife could not be maintained; (2) that, therefore, no order for alimony pendente lite could have been made; (3) and consequently that no such order could be made under section 190 (3), the power of the court being limited to the extent to which the court had power to do so in proceedings for judicial separation.

Both Lord Merrivale P. and the Court of Appeal rejected that argument, holding that the "effect of the subsection was not "to confine the power of the court to make interim orders to cases "in which the facts were such as would warrant the court in "making an order in proceedings for judicial separation, but to "confer on the court a general power to make interim orders of "the same nature and class as could be made in properly "instituted proceedings for judicial separation."

Section 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, is now repealed and replaced by section 19 (1), section 20 (1) and section 22 (1) of the Matrimonial Causes Act, 1950. By section 19 (1): "On any petition for divorce "or nullity of marriage, the court may make such interim orders "for the payment of alimony to the wife as the court thinks "just." Section 20 (1) provides: "On any petition for judicial "separation, the court may make such interim orders for the "payment of alimony to the wife as the court thinks just." Section 22 (1) makes the same provision with regard to any petition for restitution of conjugal rights.

The power of the court to make orders for maintenance where a husband has been guilty of wilful neglect to provide reasonable maintenance for the wife or the infant children of the marriage, (as distinct from orders by way of ancillary relief), is derived from section 23 of the Matrimonial Causes Act, 1950, which replaced section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, by which such power was first given to the High Court.

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[4] [1927] P. 162.

1953

S— (D. A.)
v.
S— (J. D.)

Collingwood J.

By section 23: "Where a husband has been guilty of wilful "neglect to provide reasonable maintenance for his wife or the "infant children of the marriage, the court, if it would have "jurisdiction to entertain proceedings by the wife for judicial "separation, may, on the application of the wife, order the "husband to make to her such periodical payments as may be "just; and the order may be enforced in the same manner as "an order for alimony in proceedings for judicial separation."

This section contains no provision as to interim payments such as is to be found in sections 19 (1), 20 (1) and 22 (1), and the only such provision is that which is to be found in rule 56 (10).

In my opinion, therefore, the wife in the present proceedings was not "a competent suitor in a matrimonial cause" within the meaning of that phrase as used by Lord Merrivale P. and the Master of the Rolls in *Welton* v. *Welton*,[4] and the district registrar was right in the decision at which he arrived, that he had no power to make the order asked. This appeal, therefore, fails.

Appeal dismissed.

Solicitors: *Beckinsales for Adcock, Williams, West Bromwich; Saunders, Sobell, Greenbury & Leigh for Jacobs, Bird & Co., Birmingham; John A. Behn, Twyford & Reece, Liverpool.*

J. B. G.

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[4] [1927] P. 162.

1953
Nov. 23, 24.

Barnard J.

DYSON *v.* DYSON.

Husband and Wife—Maintenance—High Court—Wilful neglect to maintain—Husband's petition containing serious allegations dismissed—Subsequent offer of reconciliation refused by wife—Absence of just cause for refusal—Whether reconciliation offer genuine—Reconciliation not desired.

A wife cannot set up the fact that her husband had made charges of cruelty and adultery in a petition which has been dismissed after trial in court as providing her for ever with just cause for refusing to live with him.

An offer by a spouse to have the other spouse back, to be genuine, does not carry the implication that the person who makes it is really desirous of having the other back, providing that he is honest in saying that he will receive her.

A husband presented a petition for divorce alleging that his wife had been guilty of cruelty and adultery. The charge of cruelty was a very grave reflection on the wife as a housewife and as a mother: she was said to have kept the home in such a filthy condition that the husband would come home and vomit because of the disgusting smells, and she was also accused of so neglecting the child of the marriage as to endanger the child's health. His petition was dismissed, the judge saying of the charges of cruelty that they were grossly exaggerated, and deliberately distorted, and that there was no truth in the complaints regarding the child. The wife's conduct with the co-respondent, however, was described as "utterly reprehensible"; but the husband's appeal to the Court of Appeal on the issue of adultery only was dismissed.

Four days after the dismissal of the appeal, the husband wrote to the wife suggesting that they should meet and see if they could "get together again." The wife, by her solicitor, refused to meet the husband and stated that there could be no question of a reconciliation; it was further stated that in view of the allegations which had been made and persisted in the wife could not accept the husband's offer as genuine. A few months later the wife issued an originating summons under section 23 of the Matrimonial Causes Act, 1950, alleging wilful neglect to maintain:—

Held, (1) that the husband, who was not suggested to have been guilty of a matrimonial offence, had not been guilty of such grave and weighty conduct as to make married life impossible.

Russell v. *Russell* [1895] P. 315; 11 T.L.R. 579; on appeal [1897] A.C. 395; 13 T.L.R. 516; *Oldroyd* v. *Oldroyd* [1896] P. 175; 12 T.L.R. 442 considered.

Held, (2) that upon a consideration of the evidence the husband's offer was a genuine one, and that in view of the wife's definite refusal to meet him, her summons must be dismissed.

Price v. *Price* [1951] P. 413; [1951] 2 All E.R. 580n. applied.

ORIGINATING SUMMONS under section 23 of the Matrimonial Causes Act, 1950, on the ground of alleged wilful neglect to maintain.

The parties were married on April 3, 1948, and there was one child of the marriage born on December 29, 1948. On January 15, 1951, the husband told the wife that he could no longer live with her and he left the matrimonial home at 34, Belleview Street, Scarborough, where he had carried on his business. The wife in fact left the house four days later and went to her parents in Scarborough with the child. On January 20, 1951, the husband's solicitors wrote to her, asking her to leave the premises, which were said to be jointly owned by the husband and his brother, and offering £1 a week for the maintenance of the child. They added that in view of the wife's conduct the husband was not in their opinion liable to maintain her. The wife's solicitors denied that the husband was justified in his attitude and said that the wife was ready to live with him. On January 30, 1951, the husband's solicitors wrote saying that cohabitation between the parties was impossible and that the husband insisted on her leaving the house. It was stated in that letter that "the position is that our client [the husband] "definitely declines to live with your client [the wife] having "regard to her conduct and he will take all necessary steps open "to him." The wife never returned to the house.

On June 13, 1951, the husband presented a petition for divorce on the ground of the wife's alleged cruelty and adultery. The adultery was alleged to have taken place between September, 1950, and January, 1951; it was alleged in support of the charge of cruelty that "from February, 1949, to January, 1951, the "[wife] caused the matrimonial home to become so filthy that "the health of the [husband] and the child of the marriage was "impaired." She was accused of keeping the home in such a condition that the husband would come home and vomit because of the disgusting smells; and the husband made grave reflections upon the wife as a mother. The wife by her answer denied the allegations.

On December 13, 1951, Collingwood J. dismissed the petition after a hearing which lasted some days, saying in respect of the way in which the wife was alleged to have looked after the child that there was "not a scrap of truth in the long list of com- "plaints," and as regards the charges generally: "It is not only "grossly exaggerated, it is grossly and deliberately distorted." He (Collingwood J.) was satisfied that the story of having to live in these appalling conditions was in the main a distortion.

There were, however, in respect of the charge of adultery, allegations which gave rise to suspicion. Allegations were accepted that the wife and co-respondent had been seen kissing and caressing each other; and Collingwood J. said: "Such con- "duct is utterly reprehensible . . . but . . . is not necessarily "accompanied by adultery."

The husband appealed to the Court of Appeal on the question of adultery only: that appeal was dismissed on June 16, 1952. On June 20, 1952, the husband wrote: "Dear Doreen, Please "find cheque for £20 for the care of you and baby Margaret. "You will no doubt have heard by now that my appeal has been "dismissed. The court decided that my suspicions were wrong. "As that is the case let us drop the matter now once and for "all, and I assure you it will never be raised again by me. The "house is still here and we really must arrange a meeting and "see if we can get together again. After all, there is Margaret "to consider, she is only four years old. Please write me, yours, "Kenneth." The wife's solicitors replied to that letter on June 24, 1952, writing to the husband's solicitors. They enclosed a copy of the husband's letter, and referred his solicitors to the letter of January 30, 1951 (supra), and continued: "We can "only express the greatest surprise that after the allegations of "cruelty and adultery which your client has seen fit to make "against our client he should consider that our client could now "agree to a meeting with him." They asked that further communications be between solicitors. The wife's solicitors wrote a further letter, also dated June 24, 1952, in which they demanded back some of the furniture belonging to the wife, which was then at the former matrimonial home; to which the husband's solicitors replied on June 26, 1952: "We are reluctant to do so" —that is, to ask the husband not to communicate further with the wife or to hand over the furniture—"as this is liable to "obstruct any possibility of a reconciliation," and they wrote again on July 9, 1952, saying that they had seen their client, and continuing: "He [the husband] informs us that his letter of "the 20th June was quite genuine and he is anxious to meet "your client with a view to discussing their affairs and if possible "to effect a reconciliation. This suggestion still stands and there "is no doubt that it would be a good idea if the parties could "meet and discuss their differences. If, however, your client "refuses to change her attitude, as stated in your letter of the "24th June, there is nothing more which our client can do "about it." The wife's solicitors replied on July 24, 1952: "We . . . note that your client assures you that his letter of the "20th June was quite genuine. In view of the very serious "nature of the allegations of cruelty which Collingwood J. so "strongly castigated in the court in December last, and in view "of the allegations of adultery which were persisted in until "recently dismissed by the Court of Appeal with the words "'This is a hopeless appeal,' our client cannot accept this to be "the fact. She is unwilling to meet her husband and there can "be no question of a reconciliation."

By summons dated October 29, 1952, the wife applied under section 23 of the Matrimonial Causes Act, 1950, for maintenance for herself and the child, and for secured provision, on the ground that the husband had wilfully neglected to provide them with reasonable maintenance.

In his affidavit the husband, after referring to the correspondence set out above, said: "Prior to the application herein and "at the time when the said letters were written, I was always "anxious to meet my wife to discuss our matrimonial affairs and "to discuss the question of a reconciliation, and, if possible, to "bring such a reconciliation about. I have been guilty of no "matrimonial offence and at all material times, after the dismissal of my said appeal, I was anxious and willing to "re-establish my home. My wife, the applicant, remains away "without just cause and in the circumstances I humbly submit "to this Honourable Court that there is no obligation upon me to "maintain her so long as she remains away. I am willing to "maintain my wife in a home to be provided by me should she "elect to return to cohabitation."

In her reply the wife averred: "In view of the nature of the "allegations of cruelty made against me [she referred to the "pleadings] and in view of the evidence given . . . in support of "those charges I found it impossible to believe that the respondent's offer of a reconciliation was bona fide. I was fortified in "my view by the fact that he had persisted in his allegations of "adultery up till 5 days previously and I felt it too much to "believe that he had genuinely changed his mind in the interim "and wanted to live with me instead of to obtain a decree of "divorce from me. . . . I respectfully submit that I am justified "in refusing to return to the respondent and that he remains in "desertion as his offer of a reconciliation is not genuine. I must "consider the position of my child who is 4 years of age and "submit that it would be wholly wrong for me to return her to the "surroundings of the matrimonial home in the circumstances."

Oral evidence was heard by Barnard J.

Neville Faulks for the wife. The husband's alleged offer was not a genuine one, and cannot be considered as such in view of his past conduct and the opinion which he appears to have formed of his wife's character as expressed in his petition for divorce. It is impossible to say that he sincerely wanted his wife back after making such allegations against her. But even if the offer were genuine, the wife was justified in refusing it, for the charges made against her, which were never properly withdrawn, were in the circumstances "gross and abominable charges" such as those referred to in *Russell* v. *Russell*[1] by Rigby L.J. The husband's conduct in making these distorted and unfounded charges was a sufficiently grave and weighty matter to justify the refusal of any such offer, coming as it did immediately after the dismissal of his appeal on the issue of adultery. [*Thomas* v. *Thomas* [2] was also referred to.] The husband's statements are not to be relied on in view of Collingwood J.'s judgment, and the wife was accordingly justified in not believing them genuine.

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[1] [1895] P. 315, 339; 11 T.L.R. 579 (C.A.); [1897] A.C. 395; 13 T.L.R. 516.

R. J. A. Temple Q.C. and *H. S. Law* for the husband. When one spouse makes an offer to resume cohabitation the best way to test its genuineness is that suggested in *Barnard* v. *Barnard* [3] and *Pike* v. *Pike*,[4] namely, " to accept it and see whether he will take " her in." *Pratt* v. *Pratt* [5] is sufficient authority for the court to be able to hold that the husband's offer in his letter of June 20, 1952, should at least have been tested. Instead, it was rebuffed out of hand.

Even if the husband should be shown by reason of the charges he had made to have been unable so soon after the dismissal of his appeal to take his wife back upon a basis of complete affection, nevertheless his offer could be held a genuine offer, and one which the wife should have accepted, for he was in any event prepared to take her into his home, to maintain her there, and to resume cohabitation. Great reliance is placed in this respect on *Price* v. *Price*,[6] where the wife had admitted that she hated her husband (and the husband in the present case is not shown in any way to have had feelings of that nature for his spouse) but was held nevertheless to have been sincere in her offer to resume cohabitation in the sense that she would implement that offer.

To find the husband in this case guilty of wilful neglect to maintain would, in effect, be to find him guilty of constructive desertion. That would mean guilty either of cruelty or of conduct of a character different from cruelty. [Reference was made to *Pike* v. *Pike*.[7]]

[BARNARD J. Are you submitting that a charge of neglect to maintain is to be decided upon principles identical with those where there is a charge of desertion?]

No. But there is a similarity to cases of restitution of conjugal rights. If the husband refuses to maintain the wife, and if the wife is justified in her refusal to return, he would then be guilty of neglect to maintain. If the wife here is to say successfully that she is justified in refusing the purported offer because of the character of the charges, she must still equate the quality of those charges with cruelty or with conduct of a grave and weighty nature which is less than cruelty. But the husband has not committed any such offence, let alone a matrimonial offence such as cruelty or adultery; and the plain answer which the wife should have given to the offer was to have seen her husband and tested whether his offer was genuine and reasonable. [*Oldroyd* v. *Oldroyd* [8] was also referred to.]

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[2] [1924] P. 194.

[3] (Unreported): November 18, 1952 (Final List of Appeals, No. 17) (see *Pike* v. *Pike* [1954] P. 81n., 89).

[4] [1954] P. 81n., 89; [1953] 1 All E.R. 232.

[5] [1939] P. 117; 55 T.L.R. 251 (C.A.); [1939] A.C. 417; 55 T.L.R. 910; [1939] 3 All E.R. 437.

[6] [1951] P. 413; [1951] 2 All E.R. 580n.

[7] [1954] P. 81n.

Neville Faulks replied.

BARNARD J. This is a summons by a wife, Doreen Lucas Dyson, in which she complains that her husband, Kenneth Dyson, has wilfully neglected to provide reasonable maintenance for her and the only child of the marriage, and she asks for an order for maintenance. It is commonplace that maintenance does not merely mean pounds, shillings and pence. If a husband is willing to provide a home for his wife, he cannot then be found guilty of wilful neglect to provide her with reasonable maintenance.

[His Lordship stated the facts and continued:] It is this charge of cruelty which has put the husband in a very grave and difficult position. It was heard and tried by Collingwood J., who gave judgment on December 13, 1951, after a hearing lasting some days, dismissed the petition, and said certain things about the charge of cruelty which I think are very important and to which I must give great weight.

The charge of cruelty was a very grave reflection on the wife as a housewife. The husband accused her of keeping the house in such a filthy and dirty condition that often he would come home and vomit because of the disgusting smells that came from different parts of the house, and, what is far more serious, he made very grave reflections on her as a mother and alleged that she so neglected the child that the child's health was in danger.

Even if Collingwood J. had accepted the husband's evidence concerning those allegations, it seems to me very doubtful whether they could possibly come within the realm of cruelty. What the husband was really doing was complaining about the character of the woman he had married. It may be that he had married a lazy woman who would not take the trouble to keep the house clean and in order, and it may be, as regards the charges relating to the child, that she was an ignorant mother, and did things from ignorance and from laziness which left the child in a dirty condition. But Collingwood J. did not believe the husband's allegations; that is clear from his judgment. When dealing with the way in which the wife was alleged to have looked after the child he said: "There is not a scrap of truth in this "long list of complaints." As regards the charges in general, Collingwood J. said this: "It is not only grossly exaggerated, it "is grossly and deliberately distorted," and he went on to say: "I am satisfied, therefore, that that story of having to live in "these appalling conditions, day after day, week after week, "is in the main a distortion."

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[8] [1896] P. 175; 12 T.L.R. 442.

I think that the charge of adultery was a very different matter. Collingwood J. heard all the evidence and came to a conclusion on it. I do not think that anybody could say that the husband had not got grounds for suspicion. There was very clear evidence, and Collingwood J. accepted the evidence, that the wife and the co-respondent were on more than one occasion seen kissing and caressing. He referred to it in his judgment and he went on to say: "Such conduct is utterly reprehensible, "nobody will seek to deny, but such conduct, in my opinion, is "not necessarily accompanied by adultery." So far as that charge is concerned, I think that the judge was really saying that the burden of proof was on the petitioner who made this charge. He had to prove it beyond all reasonable doubt, and he had failed to do so.

The husband was not content with that decision and he appealed to the Court of Appeal, but only on the charge of adultery. On June 16, 1952, the Court of Appeal dismissed the appeal. In so many words they said that it was a pure question of fact and that the judge had made up his mind; Collingwood J. had not been satisfied, and that was that, and in the circumstances it was rather hopeless to come to them by way of appeal.

Four days after that appeal had been dismissed the husband wrote a letter to his wife, and really this is the crux of the whole case before me. [His Lordship read the letter of June 20, 1952, and the reply by the wife's solicitors and continued:]

I think that it is to be noted that the wife's solicitors do not suggest that that offer by the husband is not a genuine offer; what they are suggesting there is that the wife had just cause for refusing to live with her husband by reason of the charges which he had made against her in the past. [His Lordship then referred to the further correspondence of June and July, 1952, as set out above, and continued:]

Although, of course, that was the attitude taken up by the wife, I have really to consider two points here: one is the point which is perfectly clear from the letters, whether the wife had just cause for refusing to live with her husband; and the other is whether or not the offer made by the husband on June 20, 1952, in all the circumstances of the case, was a genuine offer.

I find very little difficulty in dealing with the question of just cause. I have been referred to *Russell* v. *Russell*,[1] which not only deals with what amounts to cruelty, but also with what affords just cause in resisting a petition for restitution, or, in the same way, would amount to a good defence to a charge of desertion. I have also been referred to the decision of Gorell-Barnes J. in *Oldroyd* v. *Oldroyd*,[2] and I think that it is perfectly clear that the wife in the present case must satisfy me either that the husband has been guilty of a matrimonial offence, or else that he has been guilty of such grave and weighty conduct as to make married life quite impossible.

There is no suggestion here that the husband has been guilty of a matrimonial offence, so the wife has to satisfy me that his conduct was so grave and weighty as to make married life quite impossible. I have been referred to a case in which one spouse made charges against the other and failed, and as far as I know there was not even an apology for the charges made; but that was not considered just cause, and although I have no wish to belittle the charges of cruelty which the husband did make at one time against the wife, they were thrashed out in court, they were disposed of, and as the husband himself said in the witness-box: "Well, that's an end of it." I cannot see that the wife can for ever set up the fact that he had made these charges, which were tried out in court and dismissed, as providing her with just cause hereafter for refusing to live with him.

The other matter, whether or not the letter of June 20, 1952, is genuine, is not quite so easy. One is faced at once with the fact that it is a little difficult to believe that a husband who has described his wife in the way in which he described her when he made these charges of cruelty against her is ready to have her back.

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[1] [1895] P. 315; [1897] A.C. 395.

[2] [1896] P. 175.

On this rather difficult matter I am certainly very grateful to counsel for the husband in referring me to the case in the Court of Appeal of *Price* v. *Price*,[3] because I think that that decision makes it perfectly clear that an offer, to be genuine, does not carry the implication that the person who makes it is really desirous of having the other party back, provided that he is honest in saying that he will receive the other spouse back. In that case Somervell L.J. at the end of his judgment said[4]: "It "is plain from the evidence that the judge was determined to "probe the wife's evidence very carefully before he was satisfied "that this offer was a genuine one. As he has done that, and as "he has decided that it was a genuine offer, that to my mind is "an end of this case." Denning L.J., on dealing with what it is necessary to prove in order to establish a genuine offer, said[5]: "This wife deserted her husband and then went to the Divorce "Court and charged him with cruelty. She lost her case, and "immediately, through her solicitors, offered to go back to her "husband. She made the offer genuinely in this sense, that she "was prepared to return to her husband if he would have her; "but she did not have any genuine desire to re-establish the "marriage." Hodson L.J., dealing with this point, said[6]: "I "do not think it possible for the courts to investigate matters of "emotion", because in that case it was clear that the wife who had made the offer had said in the witness-box that she hated her husband, but her offer none the less was considered to be a genuine one, because whether she hated him or whether she did not she was prepared to make the best of it, or the worst of it, and go back to him.

It is in the light of that decision that I have to consider whether this offer was a genuine offer or not. I saw the husband in the witness-box and, of course, Mr. Faulks, on behalf of the wife, quite fairly and properly, made the most of what Collingwood J. had said about him in the divorce case. I am not seeking for one moment to go behind anything that Collingwood J. said; but I do not think that it follows that because a husband coloured his case to a great extent in order to succeed with his divorce that he is of necessity telling lies whenever he appears in court again. It is more likely that he has learned a most salutary lesson; and I say at once that I thought the husband seemed a very honest witness. I watched him carefully. In cross-examination he said: "If my wife will come back to me I shall be quite

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[3] [1951] P. 413.
[4] Ibid. 416.
[5] Ibid. 417.
[6] Ibid. 421.

"ready to provide for her." True, he went a little further, and again I think that he was genuine when he said: "I genuinely "want her back. I think if we can get together we could make a "go of it. Surely we can make something out of it?" But the wife will not even meet him. She will not allow the matter to be discussed and she made it perfectly plain in her own evidence that: "As soon as I got his letter suggesting a meeting, I made "up my mind never to go back"; and that is still her mind.

I can sympathize with the wife to a great extent, after what the husband said about her as a wife and a mother; but in law she cannot take up that attitude for ever. More than a year has passed since these unfortunate proceedings between the parties, and I feel convinced that when the husband sat down, without any legal advice or assistance, and wrote this letter to his wife, he really meant what he said. He wanted her to meet him to see whether they could not discuss the whole thing and clear the air, with a possibility of their coming together again. This would have been a very different case if the wife had been prepared to meet him and had given me evidence as to what had taken place at that interview, but she completely shut the door at a stage where I do not think that she was entitled to shut it.

It was also suggested that the husband's offer could not be a genuine one because months later, when it was apparent that she was not even going to meet him, there was trouble over some furniture and over some sum of money which the husband said that he let the wife have to furnish the house, apparently when they moved to 34, Belleview Street. That, of course, was when the two solicitors had taken up the cudgels each on behalf of their clients. There did not appear to be any possibility of a reconciliation or of a meeting and it was really only what one would expect.

I do not think that it was any idle offer of the husband's. As he told me, the matrimonial home is still there; the living accommodation is temporarily used by clerks, but within a few hours they could be turned out and he could be ready to receive his wife back in the matrimonial home. The wife suggested that she could not live in that district again, not that I think that the district matters, because she has firmly made up her mind never to live with her husband again anywhere; but the husband has said he is quite prepared to find a home anywhere else in the Scarborough neighbourhood if she does not like going back to 34, Belleview Street.

I am quite satisfied on the evidence which I have heard, in

1953

Dyson
v.
Dyson.

spite of the somewhat grim surrounding circumstances, that the husband did make a genuine offer on June 20, 1952, for his wife to meet him with a view to a reconciliation; and as the wife has definitely refused to meet him from that day onwards, I think that this summons must fail and be dismissed.

Solicitors: *A. F. and R. W. Tweedie for Cook, Fowler & Outhet, Scarborough; Ludlow, Head & Walter for Willey Hargrave & Co., Leeds.*

J. B. G.

STYLE *v.* STYLE AND KEILLER.

1953

July 15, 20.

Barnard J.

Husband and Wife—Divorce—Settlement of wife's property for benefit of husband—Court's power to antedate effect of settlement—Drafting of settlement by conveyancing counsel—Inapplicability of R.S.C., Ord. 51, *r.* 7—*Matrimonial Causes Rules*, 1950, *r.* 80—*Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 24 (1).

Husband and Wife—Maintenance—High Court. Divorce—Practice—Applicability of R.S.C.

The court has jurisdiction under section 24 (1) of the Matrimonial Causes Act, 1950, to order a settlement of a divorced wife's property for the benefit of the husband, which has the effect of securing income as from such date as the court thinks reasonable, and can make provision retrospectively for any period between such date and the execution of the settlement: the jurisdiction is not limited to making an order for a settlement with effect only from the date of its execution.

Under section 24 the court can refer the drafting of a settlement to conveyancing counsel of the court only by consent of the parties.

Order of Barnard J. [1953] 3 W.L.R. 613; [1953] 2 All E.R. 836 varied.

The husband petitioner in divorce proceedings, Charles Richard Style, was married to the respondent wife, Gabrielle Muriel Style, in November, 1938. The husband was then 37 years of age and the wife 30. The wife had a son by a previous marriage, aged 18 in 1953. The husband obtained a decree nisi of divorce on March 20, 1950, on the ground of his wife's adultery with Alexander Keiller, the co-respondent, and was awarded the sum of £5,000 damages. That decree was made absolute on May 31, 1950, and a few weeks later the wife married the co-respondent. On June 29, 1950, the husband filed

1953

STYLE
v.
STYLE AND
KEILLER.

a notice asking for a settlement of the guilty wife's property under section 24 (1) of the Matrimonial Causes Act, 1950.[1] There followed extended inquiries and negotiations as to income tax and surtax on the wife's income; demand notes had been served on the husband, had been passed to the wife's solicitors, and some years were occupied in discussions before the wife, first by an indemnity and later by payments, discharged her responsibility thereunder. On February 1, 1951, notice of the application under section 24 was served on the wife's solicitors.

The husband had been the manager of a brewery, but in 1947 he had had to retire because of ill-health, and at the hearing of the application he was in receipt of a voluntary pension of £1,000 a year, paid to him by his firm. In addition to the pension he had a small income from investments which had been largely dwindling during the years and produced an income of £550 a year, making his total gross income £1,550 a year.

The wife, on the other hand, was in possession of capital of the value, as at April 5, 1952, of about £484,000, and her gross income was between £11,000 and £12,000 a year. The registrar in his report submitted that the wife should be ordered to settle on the husband as from the decree absolute funds producing a gross sum of £1,500 a year for his life, and that that should be provided from securities to be agreed by the parties or, in default of agreement, as directed by the registrar. The registrar added that there were ample stocks and shares available for that purpose within the jurisdiction.

The wife filed a notice asking for the registrar's report to be varied on grounds which are set out in detail in the report of the judgment of Barnard J. (infra). She submitted that the registrar had misdirected himself in holding that the husband's conduct had not caused the break-up of the marriage; and that the sum proposed was excessive having regard to the absence of any reasonable prospect that the husband would have benefited from her fortune if the marriage had continued, and also having regard to the amount of capital within the jurisdiction which she would have to settle. She further submitted that the settlement ought not to take effect as from decree absolute, and that the sum should not be settled on the husband for life.

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[1] Matrimonial Causes Act, 1950, s. 24: "(1) If it appears to the "court in any case in which the court "pronounces a decree for divorce or "for judicial separation by reason of "the adultery, desertion or cruelty of "the wife that the wife is entitled to "any property either in possession or "reversion, the court may, if it thinks "fit, order such settlement as it "thinks reasonable to be made of the "property, or any part thereof, for the "benefit of the innocent party, and "of the children of the marriage or "either or any of them." (Subs. (2) provides for cases of restitution of conjugal rights in which the decree has been made on the husband's application.)

The husband by a cross-application, dated a day later than the wife's application, asked for the report to be varied by increasing the amount; but it was admitted at the hearing on his behalf that he would probably have been content with the amount ordered had the wife not asked for it to be reduced.

The wife's capital investments in this country were valued at about £54,000, and yielded just over £2,000 in the year ending April 5, 1952. Most of her property was an undivided share in property in the United States of America.

Gilbert Beyfus Q.C., *H. J. Phillimore Q.C.* and *Robin Dunn* for the husband.

F. S. Laskey and *Humphrey Tilling* for the wife.

Cur. adv. vult.

July 15, 1953. Barnard J. stated the facts, and saying that the question of educating the boy, and also the award of damages were matter for consideration, referred to the husband's application to vary the report. His Lordship continued: That notice is dated a day later than the wife's notice; but Mr. Beyfus, on behalf of the husband, very frankly told the court that, after all, attack was the best method of defence and the husband in all probability would have been content with that amount but for the fact that the wife had filed her notice asking for it to be reduced.

The wife, on the other hand, has filed a notice in which she sets forward four grounds for varying the registrar's report. First, she says that the registrar misdirected himself in holding that the husband's habits and his treatment of her did not affront or disgust her so as to cause the break-up of the marriage, and so held against the weight of evidence. I propose to say very little about this. The wife filed a number of affidavits in which she sought to establish that, quite apart from her adultery with the co-respondent, the marriage was a failure, and that she would have had to leave her husband because of his habits, which I do not propose to refer to in detail. The registrar went into this most carefully, and I have no doubt that he arrived at a true conclusion. After he had summed up the evidence and dealt with it he said this: "I disbelieve the wife's affidavits; "I think some of the allegations are entirely untrue whilst the "others are exaggerated." I think that the registrar was right, and I have no doubt myself that what really broke up this marriage was her adultery with the co-respondent; and it is both idle and futile at this stage, when she is seeking to prevent a settlement of her property, to put this defence forward.

Secondly, the wife says that the sum proposed to be settled in the report by the registrar is excessive. Her first ground of complaint alleges the absence of any reasonable prospect that the husband would have obtained any financial benefit from her fortune if the marriage had continued. She relies on what the registrar said in his report. He said: "In all the circumstances "I am doubtful whether the wife would have allowed her husband "to enjoy her fortune to the same extent as one would expect "in a more normal case, and, indeed, she did not do so even "before meeting the co-respondent." The registrar adds this, however: "There can be no doubt that he would have benefited "fairly substantially had the marriage continued uncomplicated "by this liaison." I think that the short answer to that is that but for the registrar finding those to be the facts the sum he has recommended in his report would have been far larger.

Thirdly, the wife says that the amount is excessive having regard to the amount of her capital in stocks and shares within the jurisdiction, which the report would require her to settle. Now the wife's fortune is very fully dealt with in an exhibit to her affidavit, a letter from her accountants, in which they deal with her property in a good deal of detail. In a schedule to the letter is set out a full list of her free investments in this country. The capital value of those investments is about £54,000, and the income received from them for the year ending April 5, 1952, was just over £2,000. In this one respect I am going to vary slightly the report made by the registrar, because I do not think that it would be right to tie up what might amount to three-quarters of the wife's free investments in order to produce the £1,500 a year. What rather complicates matters in this case is that the rest of the wife's property is situated in the United States of America, and a very large proportion of that is in joint ownership of land there. But she receives the income from it in this country, and I have yet to learn that income received in this country does not constitute property. Taking that into consideration, I propose to vary the registrar's report only to this extent, by giving slightly more detailed instructions as to how

1953

STYLE v. STYLE AND KEILLER.

Barnard J.

the property is to be settled. I think that the correct order is one ordering the wife to execute a settlement of her property to produce £1,500 a year gross payable to the husband during his life: one moiety, that is to say, £750 a year, to be secured on the wife's free investments in this country, which are set out in Sch. B, and as to the other moiety, the remaining £750 a year, by a charge on her income receivable in this country.

That does not, unfortunately, dispose of the matter. I must say that I would have liked to invoke the assistance of conveyancing counsel to the court, and to have ordered any deed to be settled by conveyancing counsel to the court, but, strange to say, section 24 (1) and (2) of the Matrimonial Causes Act, 1950, and also section 25, which is concerned with variation of settlement, do not give the court any jurisdiction to refer the deed to conveyancing counsel. That is quite distinct from other sections of the Act by which the court is expressly given jurisdiction to refer the matter to conveyancing counsel, such as sections 19 (2), 22 (4), 23 (2) and 26 (3). This distinction was commented on by the full court in *Bacon* v. *Bacon and Bacon.*[1] I notice, however, in reading the authorities, that in *Lorriman* v. *Lorriman and Clair,*[2] which was an application for a settlement of the guilty wife's property, the registrar followed the practice as in maintenance and submitted in his report that in default of agreement the necessary deed should be referred to conveyancing counsel. This submission seems to have passed unnoticed when the matter came before the court.

Fourthly, the wife says that the settlement ought not to take effect as from the decree absolute, and she also objects to the sum being settled on the husband for his life. With regard to that latter objection, it is well within the jurisdiction of the court to order a settlement for the husband's life, and I think that it is very right and proper in this case.

As to the other matter, I feel a very grave difficulty. I do not think myself, on looking at the section, that the court really has any jurisdiction either to ante-date the settlement or to ante-date the effect of the settlement.

By section 24 (1): "If it appears to the court in any case in "which the court pronounces a decree for divorce or for judicial "separation by reason of the adultery . . . of the wife that the "wife is entitled to any property either in possession or rever"sion. . . ." That is very different from the wording of section

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[1] (1860) 2 Sw. & Tr. 86, 87.

[2] [1908] P. 282; 24 T.L.R. 575.

1953

STYLE
v.
STYLE AND
KEILLER.

Barnard J.

19 (2), which relates to maintenance, and which commences: "On any decree for divorce. . . ." I cannot help feeling that the court has no jurisdiction to do anything except to order the wife to settle the property. That, I think, must mean that it only becomes effective as from the date of the settlement.

I am fortified in that view by *Savary* v. *Savary*.[3] In that case, which was before the Court of Appeal, the order of the President was as follows[4]: "It is ordered that the respondent "do settle and assign as beneficial owner upon the petitioner the "two several annuities hereinafter mentioned during her life, "to commence from the date of the settlement to be made "under this order," etc. That order of the President was reviewed by the Court of Appeal, and Lindley M.R. in no way criticized that part of the order. I should like to think that I was wrong, because it is obviously inviting the guilty party who has been ordered to make a settlement to delay the proceedings as long as possible, and I am not at all sure that that has not been done in this case, the husband's notice being dated as long ago as June, 1950, while we are now in July, 1953. Nevertheless, I feel that I must vary the report in this respect, and therefore the order which I propose to make must commence from the date of the settlement to be made under this order.

I have not said very much so far about the £1,500 a year which the wife has been ordered to settle. I think that the guiding principle is laid down in *Lorriman* v. *Lorriman and Clair*[5] by Bucknill J. In the course of his judgment he said that[6] "the underlying principle is that the court must try to ascertain "the nature and extent of the pecuniary change by the wife's "criminality, and in order to see that it must look at the probable "pecuniary position which the husband, the wife, and the issue "of the marriage would have occupied if the marriage had not "been dissolved."

Having regard to all the facts in this case I rather think that if I had dealt with it in the first instance myself I might not have ordered her to settle quite so much. There are no children of this marriage, and what the registrar recommends should be settled will, in effect, double the husband's income; but I think that I should have ordered only a little less. That being so, I do not think that it would be right to interfere with the sum which the registrar has arrived at after careful consideration, in which I think that he has considered every material fact which he ought to consider in an application of this kind. I also refrain from interfering with the sums recommended by the registrar because I do not feel able to agree with him that one can ante-date the effect of this settlement to the decree absolute, and there has been three years' delay. Therefore, except for the two slight variations which I have made, one which details the security a little more than the registrar has done, and the other which says that the settlement is only to be effective as from the date of its execution, I confirm the report.

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[3] (1898) 79 L.T. 607.

[4] Ibid. 610.

[5] [1908] P. 282.

[6] Ibid. 289.

I only want to add this in conclusion, that if there is any further delay, and the matter comes before me, I shall know how to deal with it.

Beyfus Q.C. submitted that it would be desirable if the deed could be settled by conveyancing counsel of the court by consent.

Tilling, upon instructions, asked for time to consider the question, but did not dissent.

BARNARD J. Subject to the consent of the wife's advisers, the deed to be settled by conveyancing counsel.

His Lordship, after ordering the wife to pay the costs, said, when the question was raised on behalf of the wife whether leave to appeal was required, that his order was a final order. He added that if the Court of Appeal considered the order to be an interlocutory one, his leave to appeal was refused.

Order accordingly.

The husband appealed.

C. A.

1954
Jan. 28, 29.

Singleton, Jenkins and Hodson L.JJ.

Gilbert Beyfus Q.C., *H. J. Phillimore Q.C.* and *W. T. Elverston* for the husband. The judge's view that he had no power under section 24 to ante-date the settlement or its effect was based on a misreading of *Savary* v. *Savary*.[1] The section is in terms very wide and gives the court an absolute discretion to look at all the circumstances and order a settlement on any terms and from any date which appear reasonable to it. A reasonable date from which to compute the annual payments in this case is February 1, 1951, the date on which notice of the husband's application was served on the wife; and the court has power to order the payment out of capital of a sum equivalent to the amount of arrears which have accrued as from that date. The views expressed and the order made by Bucknill J. in *Lorriman* v. *Lorriman and Clair* [2] are authority for such a term in a settlement. That case laid down the principle that where a marriage is dissolved and the guilty wife has property the husband shall, so far as possible, be put in the same financial position as he would have been in if the marriage had continued: see also *March* v. *March and Palumbo.*[3]

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[1] (1898) 79 L.T. 607.

[The court referred to *Paul* v. *Paul and Farquhar* [4] on variation of a settlement.]

An order made under sections 19, 20, 23 and 24 (2) of the Act of 1950 may under section 28 be discharged, varied or suspended; and in *Hasting* v. *Hasting* [5] it was held that the words "on any "decree" in section 190 (1) of the Supreme Court of Judicature Act, 1925, which occur also in section 19 of the Act of 1950, enable a petitioner to apply for a variation as long as 10 years after a decree. But an order under section 24 (1) is final, so that it is important that the settlement shall be satisfactory.

Before the registrar and Barnard J. it was accepted for the husband that a charge on the wife's income receivable from abroad would be effective; but in the opinion of conveyancing counsel that is not so. The court is therefore now asked to order that the whole annual payment, including the arrears, shall be secured on the wife's free investments within the jurisdiction.

There is no express power in section 24, as there is in section 19 (2), to refer the drafting of the settlement to conveyancing counsel of the court; but it is submitted that under R.S.C., Ord. 51, r. 7, made applicable to the Divorce Division by rule 80 of the Matrimonial Causes Rules, 1950, the court can refer the drafting to conveyancing counsel of the court though not qua such counsel. The absence of express power in section 24 does not exclude the court's general powers of reference under the Rules. The court will still have to approve the draft deed.

F. S. Laskey for the wife. It is conceded that the court has power to make a settlement effective from any date; the difficulty in the present case is to find a convenient scheme. The wife is agreeable to a charge on her income when it is received in this country, but there is no practicable or effective way of charging either the capital abroad (which is an undivided share of land in Texas) or the income when it is received in this country. In *Tallack* v. *Tallack and Broekema* [6] the court held that it could not make a settlement out of property in Holland which was not the wife's separate property. In that case the wife was domiciled out of the jurisdiction, but it makes no difference that the present respondent is domiciled in the jurisdiction, since she has not the disposal of the American capital. The only "property" which can be settled are the free investments in this country. It would be improper and unjust that the whole £1,500 should be secured on those investments. The authorities show that it has been the practice to settle up to one-third of the wife's property, the only exception discoverable being a case where there were five children, and in which one-half of the wife's property was ordered to be settled.

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[2] [1908] P. 282; 24 T.L.R. 575.

[3] (1867) L.R. 1 P. & M. 440

[4] (1870) 2 P. & M. 93.

[5] [1948] P. 68; 63 T.L.R. 564; [1947] 2 All E.R. 744.

[6] [1927] P. 211; 43 T.L.R. 467.

[HODSON L.J. There is no rule of law that only one-third can be tied up. The cases do not assist here, for the respondent has great wealth.]

One-third has been held as a rule of practice: see *Shorthouse* v. *Shorthouse*.[7]

Since there is no express power under section 24 to refer the drafting of the settlement to conveyancing counsel of the court, it is submitted that this can be done only by consent of the parties.

Phillimore Q.C. replied.

Jan. 29, 1954. SINGLETON L.J. stated the facts, read section 24 (1), and continued: In this court it has been shown that there is difficulty in securing an annual sum by a charge on income receivable from abroad. Mr. Beyfus, on behalf of the husband, read to us an opinion given by Mr. Elverston which sets out the position quite clearly, and I take this sentence from it: " . . . " accordingly it seems to me, if the views which I have expressed " above are correct, that the order of Barnard J., so far as it " directs a settlement of the respondent's income receivable in " this country, may be of no effect for want of jurisdiction, or as " having been made 'per incuriam.' "

It is common ground that there are difficulties in securing an annual sum on the income to which the woman is entitled in Texas, and which may, or may not, be received in this country. An order such as that, even if it could be enforced, as to which I have some doubt, would add to the costs of everyone, would mean continuous inquiries, and would not be to the advantage of either party. The fact remains that the wife has a very considerable income in Texas. She has both income and assets. In the circumstances, I feel that it is right that if this court is to make an order under the terms of section 24 (1), the amount ought to be secured on the free investments which she has in this country. The order of Barnard J. should be varied accordingly.

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[7] (1898) 78 L.T. 687; affirmed 79 L.T. 366.

The other variation made by Barnard J. arises on the date from which the income should run or should be secured. The report of the registrar was that the wife should be ordered to settle on the husband as from the decree absolute funds producing a gross sum of £1,500 a year for his life. Barnard J. on that said: ". . . the wife says that the settlement ought not to take effect "as from the decree absolute, and she also objects to the sum "being settled on the petitioner for his life. With regard to that "latter objection, it is well within the jurisdiction of the court to "order a settlement for the life of the petitioner, and I think that "it is very right and proper in this case. As to the other matter, "I feel a very grave difficulty. I do not think myself on looking "at the section that the court really has any jurisdiction either "to ante-date the settlement or to ante-date the effect of the "settlement." The judge read section 24 (1) and added: "That "is very different from the wording of section 19, which deals "with maintenance, and which commences: 'On any decree for "'divorce.' I cannot help feeling that the court has no jurisdiction to do anything except to order the wife to settle the "property. That, I think, must mean that it only becomes "effective as from the date of the settlement."

The section appears to me to give to the injured husband a right to ask the court to order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party. If application is not made until some considerable time after the decree absolute has been granted, I do not think that the court should order a settlement which would have the effect of securing income as from the date of the decree absolute. On the other hand, I cannot think that it is right to say, as Mr. Laskey submitted, that if application has been made by the injured party and thereafter the hearing of the application is held up for one reason or another—perhaps for years—the court has no power to deal with the period which elapses between the notice of application and the execution of the settlement. The rights of the injured party, the petitioner, might be entirely defeated if that were so; he might be dead before the litigation ended, or before a settlement was executed. Once notice of application is given to the wife, the court ought to regard that as done which ought to have been done, if and when

C. A.
1954

STYLE
v.
STYLE AND
KEILLER.

Singleton L.J.

circumstances, I feel that it is right that if this court is to make an order under the terms of section 24 (1), the amount ought to be secured on the free investments which she has in this country. The order of Barnard J. should be varied accordingly.

The other variation made by Barnard J. arises on the date from which the income should run or should be secured. The report of the registrar was that the wife should be ordered to settle on the husband as from the decree absolute funds producing a gross sum of £1,500 a year for his life. Barnard J. on that said: " . . . the wife says that the settlement ought not to take effect " as from the decree absolute, and she also objects to the sum " being settled on the petitioner for his life. With regard to that " latter objection, it is well within the jurisdiction of the court to " order a settlement for the life of the petitioner, and I think that " it is very right and proper in this case. As to the other matter, " I feel a very grave difficulty. I do not think myself on looking " at the section that the court really has any jurisdiction either " to ante-date the settlement or to ante-date the effect of the " settlement." The judge read section 24 (1) and added: " That " is very different from the wording of section 19, which deals " with maintenance, and which commences: ' On any decree for " ' divorce.' I cannot help feeling that the court has no juris- " diction to do anything except to order the wife to settle the " property. That, I think, must mean that it only becomes " effective as from the date of the settlement."

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One other question was raised. Order 51, rule 7, provides: "The court or a judge may refer to the conveyancing counsel "of the court any matter relating to the investigation of the "title to an estate with a view to an investment of money in "the purchase or on mortgage thereof, or with a view to sale "thereof, or to the settlement of a draft of a conveyance, mort-"gage, settlement, or other instrument, or any other matter "which the court or judge may think fit to refer, and may "receive and act upon the opinion given in the matter referred."

Rule 80 of the Matrimonial Causes Rules, 1950, is: "Subject "to the provisions of these rules and of any enactment the "Rules of the Supreme Court shall, notwithstanding the pro-"visions of Ord. 68 thereof, apply with the necessary "modifications to the practice and procedure in any cause or "matter to which these rules apply."

On that it was submitted that the court might refer the drafting of the settlement to conveyancing counsel of the court, although no provision to that effect is made in section 24 of the Matrimonial Causes Act, 1950. In section 19 (2) of the Act, which is concerned with alimony and maintenance in cases of divorce and nullity of marriage, there is an express power to refer such a question to conveyancing counsel of the court. I find it difficult to see, in view of the omission of any such power from section 24, how we can of our own motion so refer the question which arises here. Counsel in this respect have been most helpful. Mr. Laskey agrees that the question of the drafting of the settlement shall be referred to conveyancing counsel of the court, provided that the court approves, and that it is open to either side to bring the matter before the court. I think it is right that that should be done, and, consequently, I would direct that, by consent, the drafting of the settlement be referred to conveyancing counsel of the court, subject to the right of either party to apply thereon.

In my judgment, this appeal should be allowed in the respects which I have mentioned.

JENKINS L.J. I agree. It appears that both before the registrar and before the judge Mr. Beyfus, for the husband, had contended that the court had power to direct the making of an effective charge on the wife's American income. On the other hand, Mr. Laskey, for the wife, contended that this could not be done. The judge took the view that the American income receivable in this country could be effectively charged, and, holding that view, made the first variation. Mr. Laskey's argument has consistently been that as the American income cannot be effectively charged, the only available security consists, for practical purposes, of the wife's free investments in this country, and that it would be wrong to fix the payment to be made to the husband at as large a sum as £1,500 a year inasmuch as that would involve taking out of the wife's disposition substantially the whole of her free investments in this country. It now appears (and I do not think that it is seriously disputed on either side) that it is impracticable to provide for an effective charge on the wife's American income receivable in this country, so that the judge, in varying the registrar's report in that respect, was proceeding under a misapprehension. Nevertheless, the judge agreed with the registrar that the proper figure to be provided for the husband was a sum of £1,500 per annum, and Mr. Laskey did not contend before us that this sum, considered simply with reference to the relative means of the parties, was excessive. In these circumstances, it seems to me that this court must do the best it can to see that the sum of £1,500 per annum is effectively secured to the husband on such assets of the wife as are available for the purpose. The American assets not being so available, I think that our order should proceed on the footing that the settlement securing the £1,500 per annum should be a settlement of the wife's free investments in this country, or a competent part thereof.

The second matter on which the judge varied the registrar's report was in so far as the report provided that the settlement should be made on the husband as from the decree absolute. As to that the judge said: "I do not think myself, on looking "at the section, that the court really has any jurisdiction either "to ante-date the settlement or to ante-date the effect of the "settlement."

If, in expressing the view that the court had no jurisdiction to "ante-date the settlement," the judge meant that it is not possible for the court to order that such-and-such specific stocks shall be settled as from such-and-such a past date, I would not differ from him, for, in the nature of things, it is not possible to put back the clock and treat investments as having been settled on some past date when in fact the income arising from them during the past period in question has been spent. Even so, I think that it is wrong to say that the settlement can only operate from the date on which it is actually executed, for I am satisfied that it is perfectly competent to the court to direct a settlement which will take effect with respect to the investments to be settled as from the date of the order directing the settlement.

So far as the judge expressed the view that the court has no jurisdiction to "ante-date the effect of the settlement," I cannot agree. The court's power under section 24 (1) is expressed in these terms: in the circumstances set out "the "court may, if it thinks fit, order such settlement as it thinks "reasonable to be made of the property, or any part thereof, for "the benefit of the innocent party, and of the children of the "marriage or either or any of them."

If the court, in all the circumstances of a particular case, thinks it reasonable that a settlement should be made for the benefit of an innocent husband, and that the benefit to be taken by him under that settlement should be in the form of some annual payment, and, further, thinks it reasonable that the annual sum should be payable during his life and computed from some past date, for my part I find nothing in the construction of the section and no ground in principle for holding that the court has no jurisdiction under the section to give effect to that which it thinks reasonable to be done in the circumstances of the particular case. The date from which the benefit given to a husband under a settlement ordered to be made in any particular instance should be computed must, of course, depend on all the circumstances of the case. In the present case I agree with my Lord that the reasonable date to fix is the date of the service of the application for a settlement; that is, February 1, 1951. The result, therefore, is that the proper settlement to be here directed will be a settlement comprising the wife's free investments in this country, or a competent part thereof, and it will be framed so that the husband will receive under the settlement a sum of £1,500 a year for his life, together with an additional yearly sum of such amount as will give him an aggregate sum equal to the yearly sum of £1,500 computed from the date of the service of the application down to the execution of the settlement.

The only other matter is the period over which the payments required to give the settlement retrospective effect (if I may use that expression) shall be spread. I agree that it would be reasonable, and I think that it might be advantageous, to the wife from the point of view of income tax, if the period fixed for that purpose was seven years, and I also agree that the settlement should be framed so as to allow surplus investments to be released to the

C. A.
1954
STYLE
v.
STYLE AND
KEILLER.

wife after the additional payments for giving the settlement retrospective effect have all been made.

Accordingly, I agree that this appeal should be allowed, and that an order should be made in the sense proposed, the draft being referred, in accordance with the consent of the parties, to conveyancing counsel of the court, subject to the parties' right to raise before the judge any question that they may conceive to arise on the draft.

HODSON L.J. I agree.

Appeal allowed.
Order of Barnard J. varied.
Leave to appeal to the House of Lords refused.

Solicitors: *Kenneth Brown, Baker, Baker; Edwin Coe & Calder Woods.*

M. M. H.

IN THE ESTATE OF MALDONADO, DECD.
STATE OF SPAIN *v.* TREASURY SOLICITOR.

1953
Apr. 27, 28, 29, 30;
May 1, 4, 22.
Barnard J.

Conflict of Laws—Administration of estates—Intestacy—Deceased domiciled abroad at death—Personal estate in England—Claim of foreign State as ultimus heres—Whether Crown's claim to bona vacantia excluded.
Bona vacantia.

The deceased, a Spanish subject domiciled and resident in Spain, died intestate, leaving no next-of-kin. The State of Spain claimed a grant of administration to the personal estate of the deceased in England as sole and universal heir to her estate by Spanish law; the Treasury Solicitor claimed that the personal estate in England belonged to the Crown as bona vacantia:—

Held, by the Court of Appeal, that the property only came to the Crown as bona vacantia if the deceased died leaving no successors according to the law of the foreign domicile, or if the State of that domicile sought to assert a right to the property, not as successor to the deceased, but by a jus regale which the English courts would not recognize as having extraterritorial validity. According to the relevant law of the domicile of the deceased, however, the Spanish State took as ultimus heres and as a true successor, and accordingly the maxim mobilia sequuntur personam applied to entitle the State of Spain to the deceased's property in England.

In applying that maxim there was no valid ground for differentiating between successors who were personally connected with the deceased and other persons or bodies, including the State, which were by the law of the deceased's domicile constituted successors. Here by the law of the deceased's domicile the Spanish State was a true successor and was not seeking to exercise its paramount authority as a sovereign State to confiscate ownerless property. The English courts must recognize the capacity in which the Spanish State claimed and, consequently, the deceased having left a "successor," there was no right in the British Crown to take the estate in England as bona vacantia.

In re Barnett's Trusts [1902] 1 Ch. 847; 18 T.L.R. 454 and *In the Estate of Musurus, decd.* [1936] 2 All E.R. 1666 distinguished.

Decision of Barnard J. affirmed.

APPEAL from Barnard J.

Eloisa Hernandez Maldonado died at Pasea de Pereda no. 20, Santander, Spain, on October 11, 1924, a widow and intestate, with no ascendant, descendant or collateral relative entitled to succeed to her estate under the Spanish law. The deceased was a Spanish subject, and at the time of her death was domiciled in Spain. Her English estate consisted of securities in the custody of Hambros Bank Ld., London, which at the time of her death were valued at £13,515 5s. 4d., but which now amounted to over £26,000.

On June 4, 1930, the State of Spain obtained in Spain a declaration of heirship in accordance with article 958 of the Spanish Civil Code "to enable the State to take physical possession of the estate," and ultimately the State of Spain brought proceedings in this country in the Probate, Divorce and Admiralty Division, claiming that letters of administration to the estate of the intestate in the United Kingdom should issue to the duly-constituted attorney of the Spanish State as the sole and universal heir to her estate by Spanish law. The defendant, the Treasury Solicitor, claimed that the deceased's estate in England passed to the Crown as bona vacantia, and that he was, therefore, entitled to a grant of letters of administration to her estate in England.

In the statement of claim it was alleged that "by article 956 "of the Spanish Civil Code it is provided that when a person "dies intestate leaving no issue, parents or grandparents, surviving spouse or collaterals within the sixth degree the State "inherits as being the ultimus heres. The deceased died intestate "leaving no issue, parents or grandparents, surviving spouse, or "collaterals within the sixth degree and the State of Spain is "consequently entitled to [the deceased's] estate in England as "ultimus heres."

The defendant counterclaimed that: "As the right to the "deceased's estate in England claimed by the State of Spain "is not in the nature of a succession, there being no one who "could claim to be entitled thereto through the deceased, the "maxim 'mobilia sequunter personam' does not apply and by "the law of England the Crown is entitled to the said estate "as bona vacantia."

Charles Russell Q.C. and *I. J. Lindner* for the plaintiff.

Sir Lynn Ungoed-Thomas Q.C. and *V*[illegible] *Russell* for the defendant.

The following cases were referred to in argument: *In re Barnett's Trusts* *; *In the Estate of Musurus, decd.* †; *Cooper* v. *Cooper* ‡; *Bank voor Handel en Scheepvaart.* §

Cur. adv. vult.

May 22, 1953. BARNARD J., reading his judgment, referred to the pleadings and continued: The Probate Court is really concerned only to make a grant of letters of administration to the English estate of the deceased; and by the declaration of heirship the State of Spain has been constituted the personal representative of the deceased. Lord Westbury L.C. in his speech in *Enohin* v. *Wylie*, said [1]: "I hold it to be now put, beyond all possibility "of question, that the administration of the personal estate of a "deceased person belongs to the court of the country where the "deceased was domiciled at his death." And a little further on [2]: "It is the right and duty of that judge [meaning the judge "of the court of the domicile] to constitute the personal representative of the deceased."

In so far as the right to the grant alone is concerned, that seems to be a complete answer to the defendant's claim. This would leave the question of distribution to be decided in the Chancery Division, but as this issue is raised on the pleadings, and as both parties seemed anxious that I should decide the whole question, and in view of section 162 of the Supreme Court of

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* [1902] 1 Ch. 847; 18 T.L.R. 454.

† [1936] 2 All E.R. 1666.

‡ (1874) L.R. 7 H.L. 53, 65.

§ [1953] 1 Q.B. 248, 257; [1951] 2 T.L.R. 755; [1951] 2 All E.R. 779.

[1] (1862) 10 H.L.C. 1, 13.

[2] Ibid.

Judicature (Consolidation) Act, 1925, which directs the Probate Court, in granting administration, to have regard to the rights of persons interested in the estate, I have taken upon myself the task of deciding the whole question.

In such cases the rule according to English law, which has been established for more than 200 years, is that movable property in the case of intestacy is to be distributed according to the law of the domicile of the intestate at the time of his or her death. I must therefore look to the Spanish law to ascertain who is entitled to succeed to this property. The requisite article in the Spanish Civil Code is article 956 before the amendment of January 13, 1928. Article 95 Barnds as follows: "In default of persons having "the right to inherit in accordance with the provisions of the "foregoing sections the State shall inherit, the assets being "devoted to institutions of charity and free instruction in the "following order: 1. Municipal charitable establishments and "free schools of the place of residence of the deceased. 2. Establishments of both classes of the province to which the deceased "belonged. 3. Charitable establishments and educational establishments of a general character."

Both Mr. Valls, a member of the Spanish Bar and legal adviser to the Spanish Embassy, and Mr. Melchor, a member of the Spanish Bar of some 24 years' experience, and legal adviser to the Spanish Foreign Office, have given evidence on behalf of the plaintiff to the effect that the Spanish State takes the property of a deceased intestate as heir, just like any other heir, but Dr. Colas, also a member of the Spanish Bar and called as a witness by the defendant, asserts, on the other hand, that the Spanish State takes such property as heir by reason of bona vacantia, and that although the State takes such property as heir it is not a true heir as are family heirs, but an heir subject to certain conditions and limitations.

Dealing with Dr. Colas's first point, that the Spanish State takes such property as heir by reason of bona vacantia, Wolff in his Private International Law (2nd ed., p. 579) states: "In "default of next-of-kin, the universal rule is that the property "goes to the state or the Crown or a township or some other "public body—in Germany, Italy, and Switzerland as ultimate "'heir,' in England, Austria, and Turkey by virtue of a ius "regale over bona vacantia. In the latter case the conflict rule "on succession is not applicable because there is no 'succession' (inheritance). . . . the right to 'heirless' property is "governed by the lex situs." Wolff is clearly recognizing two approaches to this subject, whereas Dr. Colas started his evidence on the assumption that however the Spanish Civil Code was worded it could not make the State an heir in the true sense. Dr. Colas was, however, unable to maintain this assertion under cross-examination.

All the other text writers to whom I have been referred, including Dicey in the commentary on rule 178 (6th ed., p. 818) agree with Wolff's view. I also noted that Bar in his Theory and Practice of Private International Law, Gillespie's translation (2nd ed., p. 843, § 387), states: "The question to which State "property is to fall where there is no heir, whether to that in "which it is situated, or to that to which the last possessor "belonged, is dependent upon whether the right of the State to "succeed is to be considered to be a right occupatione or a right "of consolidation belonging to the feudal superior, or as a true "right of succession. In either the first or second case, the "property will go to the State where the property is situated; "in the last case it will fall to that of the domicile of the "deceased, in so far as both States hold the theory of an universal "succession, or as the estate is made up of movables."

It also seems to me to be implicit in both the judgment of Kekewich J. in *In re Barnett's Trusts*,[3] and in the judgment of Sir Boyd Merriman P. in *In the Estate of Musurus, deceased*,[4] that there are these two approaches to the subject, as stated by Wolff. In *In re Barnett's Trusts*,[5] an Austrian who was entitled to a fund in court in this country, died in Vienna, a bastard, intestate and without heirs. By Austrian law the succession of an Austrian citizen in such a case is confiscated as heirless property by the fiscus. The Austrian Government having claimed the fund, it was held that as the right claimed was not in the nature of a succession, the maxim "mobilia sequuntur "personam" did not apply, and that the Crown, by the law of England, was entitled to the fund as bona vacantia. Article 760 of the Austrian Civil Code reads as follows: "If a spouse is "no longer alive; the succession is confiscated as heirless "property either by the fiscus or by those persons who according "to the political ordinances are justified in confiscating heirless "estates"; and it was argued by the Crown that the succession by the law of Austria was confiscated as heirless property by the fiscus, and that the right of the State, therefore, was not the right of succession but the right to confiscate property where there was no heir. The property in question was in this country and the law of this country was that the Crown was entitled to it as bona vacantia. The Crown, moreover, referred to the section in Bar's Private International Law, which I have already quoted, in support of their argument. It was never a part of the Crown's case that a foreign State could in no circumstances claim the movables in this country of a deceased intestate domiciled in that State.

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[3] [1902] 1 Ch. 847; 18 T.L.R. 454.

[4] [1936] 2 All E.R. 1666.

[5] [1902] 1 Ch. 847.

Kekewich J., in the course of his judgment, stated[6]: "It is "because there is no one who can claim through the deceased "that the Crown steps in and takes the property. The Crown "takes it because it is, as it is described in the cases, bona "vacantia. It is property which no one claims—property at "large—there is no succession." And later[7]: "It must come "back to this: Under what circumstances does no succession "arise? Under what circumstances is the paramount authority "entitled to come in and say, 'I take it because there is nobody "'else to take'? That seems to me to be the whole question, "and it matters not the least whether any description of person "is allowed to come in or not, or what is the limit to those by "law entitled. When once the principle which I have "endeavoured to explain is arrived at, the large majority of the "passages and dicta which have been quoted can be construed, "regard being had to the unfortunate poverty of language which "makes us speak of 'succession' when there is no succession, "simply because there is no other expression which fits in so well "with ordinary parlance."

In *In the Estate of Musurus, deceased,*[8] a Turkish woman domiciled in Turkey died intestate and without heirs in 1915, leaving, inter alia, certain personal property in England. The British Crown claimed that as this property was ownerless in Turkish law, it must be treated as bona vacantia. The Turkish Government claimed that, under the law of the Ottoman Empire as it was in 1915, the property would have passed to the Bait al-mal, the Treasury of the Moslems, which would have applied the property for the relief and benefit of the Moslems, and that as the application of the property was thus limited to certain objects, it was impressed with something in the nature of a trust, and it was impossible to liken it to bona vacantia; and it claimed the property. If for any reason the Bait al-mal did not take any uninherited property, there was no ultimate right in anyone else. It was held that the property was ownerless, and the limited application of the property under Turkish law made no difference to its character, and that as the authority by which the Turkish Government claimed was in substance the same as that by which the British Crown claimed, the Crown was entitled to the property as bona vacantia.

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[6] [1902] 1 Ch. 857.

[7] Ibid. 859.

[8] [1936] 2 All E.R. 1666.

The argument for the Crown is not set out, but it would not seem from the judgment of Sir Boyd Merriman P. that it was ever suggested by the Crown that a foreign State could in no circumstances claim the movable estate in this country of a deceased intestate domiciled in the foreign State. The Turkish Embassy in that case claimed that the Turkish Government was in some sense a trustee because by Turkish law it had to apply the property for the relief and benefit of Moslems, and, therefore, the property was not bona vacantia.

Dr. Colas, in his evidence, stated the very reverse; that the State of Spain was not a true heir because it had to pass on the property in accordance with Article 956 of the Spanish Civil Code.

I have come to the conclusion that what matters is the capacity in which the person claims the property, and that it is quite immaterial what happens to the property later. I therefore respectfully agree with what Sir Boyd Merriman P. stated in the course of his judgment[9]: "The reason why on the one "hand goods are bona vacantia in this country or why they go to "the Bait al-mal in the old Ottoman Empire on the other, is "because they are in the strictest sense of the word ownerless. "To my mind what matters is not how the goods are disposed "of when they get into the Treasury, but the capacity in which "they come to the Treasury, and that capacity is, as I say, "because they are without any owner; there is nobody who can "succeed to them as an heir; there is nobody to whom they have "been disposed as a legatee."

Delgado, the Spanish jurist, in dealing with article 956, states: "For some, this right of the State has the character of successor "by being called to succeed as heir in default of collaterals "within the fourth degree" (Delgado is here referring to the amended Civil Code which cut down collaterals from the sixth to the fourth degree) "and for others, it means the enforcement of "the right which the State has over vacant assets by a person

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[9] [1936] 2 All E.R. 1668.

1953

In the Estate of Maldonado, decd.

Barnard J.

"who has no successor. The system of our code follows the "former principle." The other Spanish text writers to whom I have been referred, Castan, Lagos, in his preface to Delgado, and Llanas, all agree with this view.

I think it is, therefore, abundantly clear that Spain falls into the same class as Germany, Italy and Switzerland referred to by Wolff. Dr. Colas also asserts that the Spanish State is not a true heir because it is subject to certain conditions and limitations. This view seems to me to be in conflict with the view of the above text writers and also with the views of Mr. Valls and Mr. Melchor. Dr. Colas agreed in cross-examination that the relevant articles in the Civil Code dealing with heirship, e.g., articles 440, 657, 658, 659, 660 and 661, applied equally to the State as heir as to an individual heir, and Mr. Valls, in his evidence, quoted a passage from Manresa's Commentaries on the Spanish Code (1903) at p. 143, to the effect that article 957 required no further consideration, and all that was applicable to heirs was applicable to the State when it was an heir. Dr. Colas interpreted article 955 as terminating the right to inherit, but it seems clear to me that that article is only stating that the right to inherit does not extend further than the sixth degree and that the emphasis should be on the words "sixth degree"; and in any event Dr. Colas's interpretation would be in direct conflict with article 956, which says that the State shall inherit. As to conditions and limitations to which Dr. Colas referred, firstly, in accordance with article 957 the State is always understood to accept the estate subject to benefit of inventory. This does not apply to an individual heir. But when one examines the history of this matter one finds that originally the State was in precisely the same position as an individual heir, and was liable for the deceased's debts even if they exceeded the assets, unless the State as any other heir applied for benefit of inventory. But on November 5, 1918, a Spanish Royal decree made it obligatory for the State advocate, when applying for a declaration of heirship, always to ask for benefit of inventory, and now the State is always given benefit of inventory under article 957. Secondly, creditors against the State must follow a certain course by procedural law. Thirdly, the State must deal with the property in a certain way; and fourthly, the State cannot accept the estate in accordance with article 999 before a declaration of heirship.

As to the second point, this is merely a procedural course which is of convenience to the State, in its capacity as heir. The third point I have already dealt with, and Dr. Colas is arguing the case for the Turkish Embassy, in *Musurus*,[10] in reverse. As to the fourth point, this is in reality inherent in the State being an heir and is in accordance with article 958, which reads: "To "enable the State to take physical possession of the estate there "shall be a prior declaration of heirship in its favour by which "the property is allocated to it on the failure of heirs on "intestacy."

Mr. Valls stated in his evidence that there was a judgment of the Supreme Court of Spain on June 3, 1947, to the effect that property vests in the State, as heir, as from the moment of death; and according to the evidence of Mr. Melchor the declaration of heirship merely provides evidence of title to the property. Article 958 only deals with how the State is to get physical possession of the property. Before the State can obtain a declaration of heirship there must be a declaration by the court that the property is vacant; in other words, that there are no lawful heirs with a prior right to that of the State. This is part of the procedural law of Spain, and all the expert witnesses agree that procedural law cannot override the substantive law of Spain as set out in the Civil Code. In the present case the declaration of heirship was obtained by the State on June 4, 1930.

In examining the Spanish law in order to ascertain whether or not the State is a true heir according to Spanish law, I have accepted the Spanish conception of heirship, for it would be wrong in my view to apply the English conception when dealing with Spanish law; and even to try to apply the nearest English equivalent to the Spanish conception of heirship would only lead to confusion.

I am satisfied on the evidence before me that the State of Spain is a true heir just as any individual heir according to Spanish law. The only matter, therefore, which remains for consideration is whether or not there is anything either contrary to public policy or so repugnant to English law as to prevent such a right acquired under a law of a foreign country from being enforced in the English courts.

All civilized States take possession of ownerless property, and according to Manresa in his Commentary on the Spanish Civil Code: "The right of the State over the property of any person "dying intestate and without leaving heirs, is based on the "actual situation of abandonment of the property in question,

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[10] [1936] 2 All E.R. 1666.

"on the absence of any owner and of any other person entitled "thereto." But the law of Spain has developed along different lines from that of England. The State, by Spanish law, takes the property in a line of succession as ultimate heir. In England, the property belongs to the Crown as bona vacantia, and since the Administration of Estates Act, 1925, s. 46 (4), in lieu of any right to escheat. The appearance of the Crown, as ultimately entitled to property, in a statute regulating the distribution of an intestate's estate, did not alter the capacity in which the Crown took such property. This was made clear by the decision of the Court of Appeal in *In the Estate of Hanley*,[11] which held that the Crown, under section 46, was not a person entitled upon an intestacy.

Counsel for the defendant, in the course of his argument, stressed the fact that the State of Spain has created itself heir by its own act, and that it becomes a question of public international law when a foreign State makes itself owner of property in another State. But I have come to the conclusion that the State of Spain is not making itself the owner of property in this country, nor is it seeking in any way to exercise its sovereignty in this country. It is merely claiming property in this country, as heir to the property by Spanish law, in the same way as one of the next-of-kin might claim as heir. Counsel for the defendant also argued that this claim put forward by the Spanish State conflicts with the right of the Crown to take the property as bona vacantia. This argument seems to me to beg the whole question. I feel satisfied that there is nothing either contrary to English public policy or repugnant to English law in permitting a foreign State to take possession of the movables of one of its subjects in this country. This point of view seems to me to be not only consistent with, but implicit in, the judgments of Kekewich J. in *In re Barnett's Trusts*[12] and of Sir Boyd Merriman P. in *In the Estate of Musurus, decd.*[13] It also appears to me to accord with natural justice, namely, that the property of a deceased Spanish woman who died intestate should be distributed among charities in her own locality in Spain rather than go to the English Crown.

I am satisfied that by Spanish law the State of Spain is the sole and universal heir of the deceased, and that, therefore, the deceased's English assets are not ownerless, but belong to the

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[11] [1942] P. 33; [1941] 3 All E.R. 301.

[12] [1902] 1 Ch. 847.

[13] [1936] 2 All E.R. 1666.

1953

IN THE ESTATE OF MALDONADO, DECD.

State of Spain. I accordingly direct that letters of administration of the English estate of the deceased be granted to the duly constituted attorney of the Spanish State.

I make no order as to costs.

J. B. G.

The Treasury Solicitor appealed, but did not contest the decision as to the capacity in which the Spanish State took according to Spanish law.

C. A.

1953 Nov. 26, 27, 30.

Evershed M.R., Jenkins and Morris L.JJ.

Sir Lynn Ungoed-Thomas Q.C. and *Victor Russell* for the Treasury Solicitor. English courts recognize the right of relatives of a foreigner domiciled abroad to succeed according to the law of his domicile to his personalty in this country. If, however, there are no relatives who are entitled to succeed according to that law, the English Crown takes the personalty as bona vacantia. The claim of the Crown will prevail against a similar claim by the foreign State, for the claim to bona vacantia by the Crown is, and has been from the earliest times, an exercise of the Royal Prerogative (see *Dyke* v. *Walford*[1]), and the English courts will not give extra-territorial validity to an exercise of the paramount authority of a foreign State, particularly if it is in opposition to a similar authority here. The question is whether the English courts will recognize a claim by the foreign State in the capacity of successor to the deceased, as distinct from a claim by jus regale or exercise of paramount authority. Barnard J. has found that the State of Spain is, according to Spanish law, entitled as ultimus heres as a successor in the ordinary sense, just as any private citizen. He did not, however, consider the further question whether, assuming that the State of Spain is a successor according to Spanish law, the English courts will have regard to that.

The general rule is that the lex situs governs the administration of estates, but English law allows an exception in the case of personalty. The question here is what is the exact scope of that exception, or, in other words, what are the limits of the maxim mobilia sequuntur personam as recognized by the English rules of private international law. English law contemplates that a "successor" has a personal nexus with the deceased, and it is arguable that a claimant by virtue of the foreign law of the domicile will only be recognized as a "successor" in the eyes of English law if there be such a personal nexus. That nexus clearly is absent where the State is the claimant. The appellant's case need not, however, be put so high; it is possible that the English courts would recognize the right of any person or body to be a "successor" according to the law of the domicile, excepting only the State itself. If, for example, the Spanish Civil Code had provided that in default of heirs the property should go to the Archbishop of Toledo as "successor," it may be that the English courts would recognize his right to movables here. The line must, however, be drawn so as to exclude the State from taking. The reason and justification for that exclusion is that although, as a concession to civilized rights which all civilized countries normally recognize, English courts have accepted that mobilia sequuntur personam, they do so only in so far as is necessary to achieve the purpose underlying all rules of private international law, that is, the purpose of providing for the private rights of individuals. Having exhausted those rights, the limit of recognition of the law of the domicile is reached. English courts will, therefore, have regard to the regulatory provisions of the foreign State, deciding the rights inter se of its subjects to be "successors" to the personalty of the deceased, but will not recognize an enactment by which the foreign State itself is to take, for that involves the relations between States and is, therefore, a matter which belongs to the sphere of public, rather than to private, international law.

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[1] (1846) 5 Moo.P.C. 434.

The English rules of private international law are dominant because the property in question is in England. The authority of the State of the deceased's domicile operates only within its own territory and any extra-territorial validity over movables can only be by virtue of the lex situs: Dicey, Conflict of Laws, 6th ed., pp. 13–14. Spanish law can, therefore, only regulate the devolution of the property in question in so far as that law is consistent with and is permitted to do so by English law and by the English rules of private international law.

The claim of the Spanish State depends on an artificial distinction between taking as ultimus heres and taking bona vacantia by a jus regale. The distinction is merely one of words; in both cases the State really takes because it is the paramount authority. The English Crown takes bona vacantia as the paramount authority because there is no one who has a personal nexus with the deceased. In Spain, the State takes by its own action as paramount authority, whatever words are used in the code. It would, of course, be different if in either case the State took under a will, for then there would be a nexus with the deceased. The question is, therefore, whether in the present circumstances regard should be had to the words used in the local statute, that is, to the mere form of the taking, or whether the substance is the test. In *In re Barnett's Trusts* [2] and in *In re Musurus* [3] emphasis was laid on the substance. English law looks at the substance rather than the mere words, for, as was said in *In re Barnett's Trusts*,[4] words may be used in different senses. Irrespective of the capacity in which the State may take by its own laws, according to English law the taking by the State is classified as a jus regale. Foreign textbook writers (see L. von Bar, The Theory and Practice of Private International Law, 2nd ed. (1892), and Laurent, Droit civil international (1880)) show that in other countries the taking may be classified differently, but the classification according to English law is that which is relevant here and decides the scope of the matters which are assigned to foreign law: Dicey, Conflict of Laws, 6th ed., pp. 62 et seq., and Breslauer, Private International Law of Succession in England, America and Germany, 1937, p. 9.

It would be inconvenient to have to have regard to the Spanish law on this matter, for, if that is the correct application of the English rule of private international law, it would mean that in every case the exact status of the State according to the foreign law would have to be determined. The contrary view would give a rule of general application working mutually in all cases. Further, there is no evidence that if the claims of the State of Spain to be a successor were recognized, the State of Spain would reciprocate in the converse case.

The claim of the Spanish State involves a conflict between the sovereign rights of the two States, and in such circumstances the right of the State where the property is situate will prevail, and, just as the courts have refused to recognize foreign penal laws, foreign revenue laws and foreign confiscatory legislation (see *Bank voor Handel en Scheepvaart N.V.* v. *Slatford* [5]), so here the claim of the State of Spain should be rejected. [Reference was also made to *In re Hanley*.[6]]

Charles Russell Q.C. and *I. J. Lindner Q.C.* for the State of Spain. The submission on behalf of the Crown that English law, including the English rules of private international law, will only recognize as a "successor" a person or body having a personal nexus with the deceased is inconsistent with the qualification on behalf of the Crown that only the State itself is excluded from recognition. It is conceded on behalf of the Crown that a right of an official having no sort of personal connexion or relation with the deceased, such as, for example, the Archbishop of Toledo, if constituted "successor" by the law of the domicile would be recognized by the English courts, whether he took for his own benefit or merely to divide the proceeds between local charities. In substance, however, there is no difference between the provision that, in default of relatives, some official should take for charitable purposes and a provision, as in the present case, that in such circumstances the State should take for charitable purposes. It is conceded on behalf of the Crown that if the property had been left by will to the State, the State would have taken as a "successor"; but it is equally true that there would be a succession to the State if the relevant law was that, where the intestate leaves no next-of-kin within the specified degrees, there should be deemed to be a will by which the property was given to the State. The English Statute of Distribution is sometimes referred to as a "being in the nature of a will" (see *Cooper* v. *Cooper* [7]), and the recognition of the "statutory will" of the law of the domicile in its entirety would overcome any injustice which might otherwise arise if the deceased had deliberately refrained from making a will because he or she was satisfied with the devolution on intestacy according to the law of the domicile, and had anticipated, for example, applying the present circumstances, that, assuming he or she had no next-of-kin, the local charities would benefit.

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[2] [1902] 1 Ch. 847; 18 T.L.R. 454.

[3] [1936] 2 All E.R. 1666.

[4] [1902] 1 Ch. 847.

[5] [1953] 1 Q.B. 248, 257; [1951] 2 T.L.R. 755; [1951] 2 All E.R. 779.

[6] [1942] P. 33.

By the terms of the Spanish Civil Code the Spanish State, as Barnard J. found, takes as a "successor." If the code had provided that the State took bona vacantia and not that the State inherited, the respondents would probably have been unable to claim, as in *In re Barnett's Trusts*.[8] The textbooks accept a distinction between a taking as ultimus heres and the right of the State to bona vacantia; that distinction is also recognized in *In re Barnett's Trusts* [8] and in *In re Musurus*.[9] If the appellant's argument were correct, the short answer in both those cases would have been that, whatever the local law, no foreign law could be recognized as saying that the State could take on intestacy. In *In re Barnett's Trusts* [10] it was recognized that the paramount authority might take as a continuation of the persona, though in that case the particular authority under consideration, the Austrian State, did not take in that capacity.

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[7] (1874) L.R. 7 H.L. 53, 65.

[8] [1902] 1 Ch. 847.

[9] [1936] 2 All E.R. 1666.

[10] [1902] 1 Ch. 847.

The taking by the Spanish State is not repugnant in any sense to English law, nor does any question of the public relations between States arise here, for there is no assertion of sovereignty outside the territorial limits of the State. Where the English rules of private international law have regard to the law of the domicile, and by that law the foreign State takes on intestacy and in default of next-of-kin as a "successor," then the Crown's claim to bona vacantia does not arise. It is misleading to regard the Spanish claim as conflicting with an existing right of the English Crown, for the English right does not in fact arise. If the Crown is put at a disadvantage vis-à-vis countries where the State "inherits," the position can be rectified by legislation. That brings out clearly that the Act of the foreign State does not impinge on the sovereignty of the English Crown, since the foreign Act has effect only so long as the English Parliament does not provide otherwise.

There is no support for the contention of the Crown that in the eyes of English law there cannot be a succession unless the "successor" has a personal nexus with the deceased. If the State inherits and is truly heir, in so far as there may be any conception of continuity of the persona of the deceased, the State is just as capable of preserving continuity as an individual. The continuity only finally breaks down where there is no one to take.

The exclusion of the State from the class of "successors" who may be recognized by the English law is illogical; nor is there any other place where a line can reasonably be drawn between "successors" whose claims will be recognized and those whose claims will be rejected. The real test is whether the State claim is an assertion of "inheritance" because no one inherits the property, or whether it is an assertion of jus regale because no one owns the property: Dicey, Conflict of Laws, 6th ed., p. 818; Cheshire, Private International Law, 4th ed., p. 59; Wolff, Private International Law, 2nd ed., p. 579; W. Breslauer, The Private International Law of Succession in England, America and Germany, 1937, pp. 56 to 59.

The onus is on the Crown to satisfy the court that this is an exception to the rule which has been applied for 200 years, that the distribution of the personal estate of an intestate will follow the law of the domicile, subject only to the limitation established by *In re Barnett's Trusts* [10] and *In re Musurus.*[11] The usual rule did not apply in those two cases because the States in question took by a jus regale because there was no owner, and not because there was no "successor" or no one inheriting. That exception should not be extended, and, indeed, *In re Barnett's Trusts* [12] has been criticized: see the Law Quarterly Review (1902), vol. 18, p. 230. Even in those cases the distinction between the two conceptions is implicit and they support the respondent's claim.

It is said for the Crown that one must not look at the mere words used, but that regard must be had rather to the substance of the status in which the State takes. If that is done in the present instance, the substance is that the charities are getting the benefit, just as they might have done if the Civil Code had appointed some official to take.

Sir Lynn Ungoed-Thomas Q.C. in reply. The State of Spain does not take on trust for charity, and it is clear from *In re Musurus* [13] that it is not relevant to look beyond the taking by the State to see what happens subsequently to the property. Here, as Barnard J. found, the State of Spain takes as a true heir, and any benefit which the charities may derive is irrelevant. The position is exactly the same as if the money had gone into the fiscus of the State. Similarly, it is not relevant to consider that the State takes only after failure of collaterals within the specified degrees, for the position would be the same if all the collaterals had been ruled out. The claim should fail, not because the taking is regarded as being confiscatory, but because English law will not recognize an enactment of a foreign State which, in effect, hands over to itself property here belonging to a person domiciled in that foreign country: *Bank voor Handel en Scheepvaart N.V.* v. *Slatford.*[14] The line between those successors which will be recognized by English law and those persons or bodies which the English law does not recognize as "successors," whatever their status by the law of the domicile, can, it is submitted, be drawn either after failure of kindred, or so as to exclude all those takers who have no personal nexus with the deceased. In either case the State will be excluded. No implication can be drawn from the way in which the matter was dealt with in *In re Barnett's Trusts*,[15] for there the question was whether the courts would recognize a taking by the State in precisely the same capacity as that in which the English Crown takes bona vacantia, and the question whether English law would recognize a taking by the State as ultimus heres was expressly left open.

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[10] [1902] 1 Ch. 847.

[11] [1936] 2 All E.R. 1666.

[12] [1902] 1 Ch. 847.

[13] [1936] 2 All E.R. 1666.

[14] [1953] 1 Q.B. 248.

[15] [1902] 1 Ch. 847.

The submission of the State of Spain that the absence of conflict in the sphere of public international law is shown by the fact that Parliament can by legislation override the claim of the Spanish State to take as ultimus heres would apply whether the State takes as ultimus heres or by a jus regale. It is not a valid argument, for the matter has to be taken on the law as it stands. The conflict does not arise after the assignment to the foreign State, but in ascertaining the delimitation of what is assigned to Spanish law at the outset. Dicey (p. 818) and Cheshire (p. 60) assume that, in following and recognizing the rule mobilia sequuntur personam, the English law assigns to the foreign law the function of determining who are to be the "successors." That is incorrect, for, as Cheshire himself says at p. 56, the classification of a rule involving a question of private international law, that is, in the present case the question of the scope of the matters which are assigned to the foreign law, is determined in accordance with the purpose and policy which that rule is designed to serve.

Nov. 30, 1953. EVERSHED M.R. The substantial question raised in this action and on this appeal is whether the plaintiff, the State of Spain, or the defendant, the Solicitor for the affairs of Her Majesty's Treasury, on behalf of the English Crown, is entitled to certain personalty in this country which belonged to Eloisa Hernandez Maldonado at the date of her death on October 11, 1924.

[His Lordship referred to the facts set out above and continued:] It was agreed at the hearing before Barnard J.[1] and it has been conceded in this court that that was the real question, since it is conceded that the right to the grant of letters of administration depends on the right to the property. The claim of the plaintiff rests on the basis that, in the circumstances of the case, the State of Spain is by Spanish law entitled to inherit all the property of the intestate as "successor" and, accordingly, that the English courts will apply the principle mobilia sequuntur personam and accept the State of Spain as entitled to the property.

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[1] Ante, p. 225.

C. A.
1953

IN THE ESTATE OF MALDONADO, DECD.

Evershed M.R.

The defendant argues that the claim of the State of Spain is not by way of a succession, but arises as a result of the exercise of a paramount right of a sovereign State to take property of its nationals which has become ownerless on their deaths; and that the corresponding right of the British Crown to ownerless property is the only right which the English courts will recognize in this case because the property in question is in England.

Barnard J. had first to determine what was the relevant Spanish law. The material article of the Spanish Civil Code which was in force in October, 1924 (the date of the death) is article 956, of which the agreed translation is: "In default of "persons having the right to inherit in accordance with the provisions of the foregoing sections the State shall inherit, the "assets being devoted to institutions of charity and free instruction in the following order: 1. Municipal charitable establishments and free schools of the place of residence of the deceased. "2. Establishments of both classes of the province to which "the deceased belonged. 3. Charitable establishments and "educational establishments of a general character."

There was a sharp conflict of expert testimony over this article. Two witnesses called for the plaintiff said that the effect of the article was that, in the events which had happened, as the intestate had left no issue, parents or grandparents, surviving spouse, or collaterals within the sixth degree, the State of Spain was entitled as ultimus heres. Dr. Colas, for the defendant, said that, notwithstanding the language of the article, the State of Spain was not a true heir or successor, but had become entitled to this property as bona vacantia. Barnard J. decided clearly in favour of the evidence of the witnesses for the plaintiff, and said [1]: "I am satisfied on the evidence before me that the State "of Spain is a true heir just as any individual heir according "to Spanish law." That finding has not been challenged in this court.

Sir Lynn Ungoed-Thomas's argument before us may fairly be stated in the form of four propositions: (1) Prima facie, movable property situate within the limits and jurisdiction of any State is subject to the laws of that State, and if such property be found to be ownerless it will pass to and become the property of that State. This, at least, is the law of England, and in the case supposed the property is assumed in England by the Crown as bona vacantia. (2) To the above general rule there is an exception, being a rule of private international law generally accepted by and forming part of the law of civilized States, including England. The exception is expressed by the formula mobilia sequuntur personam. Thus if a deceased national of another country dies domiciled in that other country, as in the present case, the person or persons who are by the law of that other country entitled to succeed to the movables, either under a testamentary disposition valid by the law of that other country, or on an intestacy, will be treated in this country as entitled to the movables here. (3) The extent and scope, however, of the exception expressed by the formula mobilia sequuntur personam is a matter in each State for the municipal law of that State. (4) If a national of another State dies domiciled in that State, and dies intestate according to the laws of that State (as in the present case), the English courts will not recognize as having a title to the movables of the intestate here any persons who are not "successors" in accordance with some generally-recognized nexus of personal relationship with the intestate, or, at least, they will not recognize as a successor the foreign State itself which has made itself a successor by its own laws; for, notwithstanding the language used in those laws, the truth is that that State is exercising the equivalent of our jus regale as regards ownerless property. In further support of his fourth proposition, Sir Lynn argued that, since the rules of private international law apply to the relations inter se of individuals or, at least, of subjects of States and not to the relations inter se of States themselves, the scope of the exception, necessarily and logically stops short of the recognition of a State as successor.

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[1] Ante, pp. 225, 231.

Mr. Charles Russell, for the State of Spain, has not been concerned to contest the first three of Sir Lynn's propositions. His challenge has been directed to the fourth and last. According to his argument the successors of the foreign intestate are those persons, whether natural persons or persona fictae (including the foreign State itself) who, by the laws of the foreign State, are constituted successors. There can, according to Mr. Russell, be no valid justification for a requirement by our courts that the successors should have a particular quality: for example, that they should be blood relations in some degree of the deceased. Thus, to take the example used during the course of argument, if the Spanish law had decreed that, in default of any relations of the degrees stated in the code, the Archbishop of Toledo should be the next successor, the English courts would have had to recognize the title of the Archbishop to the movables here of a Spanish intestate; and Mr. Russell says that it follows that no line can be drawn to exclude a persona ficta, whether a corporation, a municipality, or the State itself, so long as by Spanish law, such personae are in truth made successors and do not claim that title in some other way, for example, by a right of appropriation of the property as bona vacantia.

In confining his argument to this single question, Mr. Russell accepted as good law the decision of Kekewich J. in *In re Barnett's Trusts*,[2] a decision which was followed by Sir Boyd Merriman P. in *In the Estate of Musurus, decd.*[3]

In *In re Barnett's Trusts*[4] the British Crown claimed, as bona vacantia, movables belonging to a former Austrian citizen. A representative of the then Austrian Government, who also claimed the property, was joined as a party for the purpose of the argument. The relevant article 760 of the Austrian Code, which differed from the article of the Spanish Code now in question, provided: "If a spouse is no longer alive, the succession is "confiscated as heirless property either by the fiscus or by those "persons who according to the political ordinances are justified "in confiscating heirless estates." Kekewich J. held that the claim of the Austrian Government, by its representative, did not depend upon his being in the guise or clothing of a successor; his claim was a claim to ownerless property, and as between similar claims on the part of the British Crown and on the part of the Austrian Government, that of the former must prevail. It was observed pertinently by Mr. Russell that in that case no argument was put forward on the part of the British Crown that no claim to "ownerless" movables by a foreign State as a successor, or in any other capacity, could be successfully put forward in these courts. The argument of the then law officers who represented the Crown was based on the terms of article 760, and was to the effect that the right asserted by the Austrian Government rested upon a confiscation in the terms of article 760 of the property as heirless (that is, ownerless) property.

At the end of the argument there is this passage[5]: "If in "one of the countries a different principle prevailed," (that is, if the State took not by the confiscation of heirless property, but as being a successor) "a more difficult question might arise, "because international law depends on reciprocity. But as in "this country, so in Austria the State takes, not as 'ultimus

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[2] [1902] 1 Ch. 847.
[3] [1936] 2 All E.R. 1666.
[4] [1902] 1 Ch. 847.
[5] Ibid. 852.

" 'heres' but 'jure regali.' It being clear that goods of this " kind are taken by the Crown in both countries as bona " vacantia, the law of England must apply to the English goods " as the law of Austria would to goods in Austria."

The following passage from Bar's The Theory and Practice of Private International Law, Gillespie's translation, 2nd ed. (1892), p. 843, was cited in that case and also by Barnard J.: "The " question to which State property is to fall where there is no " heir, whether to that in which it is situated, or to that to " which the last possessor belonged, is dependent upon whether " the right of the State to succeed is to be considered to be " a right occupatione or a right of consolidation belonging to " the feudal superior, or as a true right of succession. In " either the first or second case, the property will go to the " State where the property is situated; in the last case it " will fall to that of the domicile of the deceased, in so far as " both States hold the theory of an universal succession, or as " the estate is made up of movables. The theory which is in conformity with modern ideas of law, which is more deserving of " our respect, and which undoubtedly now prevails as the theory " of the law in Germany, is that, if there is no one nearer in " blood to be called to the succession, a man's fellow-countrymen " must be regarded as his heirs. This view is supported by the " fact that it is the State to which a man belongs that fixes the " circle of those who are entitled to succeed to him as heirs, " drawing it more or less wide, as it pleases; while, on the other " hand, it has more or less of the air of robbery for a State to " seize on the movable estate of a deceased person, who was by " mere accident resident there at the moment of his death. " Thus the State whose subject and citizen the deceased was, " will be entitled to succeed him. But, beyond Germany, the " other rule still prevails, and each State seizes the movables " which happen to be within its borders."

Barnard J. also referred to this passage in Wolff on Private International Law (1950), 2nd ed., p. 579: "In default of next " of kin, the universal rule is that the property goes to the State " or the Crown or a township or some other public body—in Germany, Italy, and Switzerland as ultimate 'heir,' in England, " Austria, and Turkey by virtue of a ius regale over bona vacantia. " In the latter case the conflict rule on succession is not applicable " because there is no 'succession' (inheritance). . . . , the right " to 'heirless' property is governed by the lex situs."

More examples of a recognition of the distinction between

C. A.
1953

IN THE ESTATE OF MALDONADO, DECD.

Evershed M.R.

the characters in which sovereign States may take appear in other textbooks to which we were referred during the course of the argument. For example, in Dicey's Conflict of Laws, 6th ed., p. 817, after the statement of rule 178: "The succession "to the movables of an intestate is governed by the law of his "domicile at the time of his death . . . ," this passage is found at p. 818: "Where a person dies, e.g., intestate and a bastard, "and under the law of the country where he is domiciled there "is no succession to his movables, but they are bona vacantia, "and leaves movables situate in a country, e.g., England, in "which he is not domiciled, the title to such movables is "governed by the lex situs, i.e., under English law the movables "being situate in England, the Crown is entitled thereto. In "such a case the foreign Treasury claims not by way of succession but because there is no succession. It does not follow "that the decision would be the same if the law of the domicile "was such that the foreign Treasury claimed as ultimus heres. "That would be a true case of succession and would, it is "submitted, be governed by the law of the domicile." As will be observed, the result where a foreign State claims by way of succession is put as a submission. It is stated more positively in another textbook by a modern author, Professor Cheshire's Private International Law, 4th ed., at pp. 59 and following.

Assuming, however, that there is a valid distinction to be found between the case where a sovereign State claims the property on the footing that it is ownerless and is bona vacantia, and the case where the State claims as being the successor by virtue of its own laws, I have not been able to find a statement in any of the cases or the textbooks, nor was our attention drawn to any statement, that there is in England a rule which confines successors to individuals having a particular quality or a particular characteristic, or which has the effect of excluding a State from ever having that capacity.

In my judgment the real question is, what is the right or title by virtue of which the Spanish State now makes its claim? In my opinion, this point has been decided adversely to the Treasury Solicitor by Barnard J. when he said [6]: "I am satisfied "on the evidence before me that the State of Spain is a true "heir just as any individual heir according to Spanish law." That finding, the validity of which has not been challenged, I regard as conclusive against the appeal. I am unable to accept that, notwithstanding that finding, the English courts will reject the result on an a priori view of the necessary qualifications for succession. If by the law of Spain it is possible to limit or define the individuals who can claim to be successors, namely, individuals having some connexion by blood or marriage with the deceased, I can see no reason why, in default of there being such an individual, the law of Spain should not nominate or constitute as heir any person or corporation, including the State itself. The idea of succession doubtless imports some notion of continuity, for example, continuity of title; but I see no reason why this conception should be inapplicable to the State which is constituted successor by its own laws. It is conceded that if under a valid will property of the deceased were given to the State of Spain, that State would be treated as being a successor, although in that case it would be a successor as the result of the testamentary disposition. Nor does the Latin word "heres," from which the word "inherit" is derived, necessarily involve any notion of some blood connexion. To quote a sentence from Cicero, Phil. 2, 16, 41, "me nemo nisi amicus fecit heredem." In my judgment, there is here no question of the law of Spain amounting to a confiscation which would be regarded as repugnant to our own laws, and which for that reason would not be enforceable in these courts.

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[6] Ante, p. 321.

Finally, I refer again to the passage at the end of the reported argument in *In re Barnett's Trusts* [7] where it is submitted: "If "in one of the countries a different principle prevailed, a more "difficult question might arise, because international law depends "on reciprocity." There is before us no evidence of what the law of Spain would be in the converse case of an English national dying domiciled in England intestate without next-of-kin under the English law and leaving movables in Spain. I am, however, not able to reject the argument of Mr. Charles Russell on the ground that there is no evidence here that the law, as I think that it should be held in this country, might not be reciprocal in Spain.

For those reasons I think that this appeal fails and should be dismissed.

Jenkins L.J. referred to the facts, read article 956 of the Spanish Civil Code set out in the judgment of Evershed M.R., and continued: The general rule to be applied in a case such as

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[7] [1902] 1 Ch. 847, 852.

C. A.
1953

In the Estate of Maldonado, decd.

Jenkins L.J.

this is summed up in the maxim mobilia sequuntur personam, and is thus stated in Dicey's Conflict of Laws, 6th ed., at p. 814: "Rule 177. The distribution of the distributable residue of the "movables of the deceased is (in general) governed by the law of "the deceased's domicile (lex domicilii) at the time of his death." Thus, in the present case the personalty in question should, prima facie, devolve in accordance with Spanish law, and, therefore, go to the State of Spain for application in accordance with the provisions of article 956.

There is, however, an admitted exception to the general rule to the effect that if, according to the law of the foreign State in which the deceased is domiciled, there is no one entitled to succeed to the movable property of the deceased owing, for example, to the bastardy of the deceased, or to the failure of kin near enough in degree to qualify for succession under the law of the domicile, and, by the law of the foreign State, the State itself is, in such circumstances, entitled to appropriate the property of the deceased as ownerless property by virtue of some jus regale corresponding to our own law of bona vacantia, English law will not recognize the claim of the foreign State as part of the law of succession of the domicile, but will treat it merely as being the assertion by the foreign State of a prerogative right which has no extra-territorial validity and one which must yield to the corresponding prerogative right of the Crown. That appears from Dicey at p. 818 in the passage to which Evershed M.R. has already referred: "Where a person dies, e.g., intestate and "a bastard, and under the law of the country where he is "domiciled there is no succession to his movables, but they are "bona vacantia, and leaves movables situate in a country, "e.g., England, in which he is not domiciled, the title to "such movables is governed by the lex situs, i.e., under English "law the movables being situate in England, the Crown is "entitled thereto. In such a case the foreign Treasury claims "not by way of succession but because there is no succession."

The law of the relevant foreign State, however, may be such as to constitute the State itself the successor to the deceased in the absence of any individual with a prior right of succession under that law, and the question then arises whether the claim of the foreign State should be recognized under the general rule as being the claim of a person entitled to succeed according to the law of the domicile, or whether it should be treated as falling within the exception, on the ground that the claim of the foreign State, as self-constituted successor, does not differ in substance, or in principle, from a claim by a foreign State by virtue of its paramount right to ownerless property within its dominions as bona vacantia or the equivalent.

Accordingly, two questions were debated below: first, whether under the Spanish Civil Code the State takes as a true heir or successor in the eye of Spanish law, or takes by virtue of a jus regale; and secondly, if it takes in the former capacity, whether English law will recognize the State of Spain as a true heir or successor for the purpose of the maxim mobilia sequuntur personam. Barnard J., having heard evidence on both sides in regard to the Spanish law, answered the first question in the former sense, and the second question in the affirmative, holding in effect that the answer to the second followed from the answer to the first. Barnard J.'s decision on the first question has not been challenged by the Crown in this court. The sole issue before us, therefore, is whether the State of Spain, being admittedly according to its own law the true heir of, or successor to, the intestate, should be recognized as such by English law in its application of the general rule that is expressed in the maxim mobilia sequuntur personam.

This question has not been the subject of any direct decision, but the distinction between a sovereign state claiming "jure "regali" and claiming as true heir or successor was recognized in *In re Barnett's Trusts*,[8] and *In re Musurus, decd.*[9] Inasmuch as the foreign law in each of those cases was held to give the foreign State concerned a jus regale, as distinct from a true right of succession, there was no actual decision on the present question; but the distinction was recognized. Indeed, as it was pointed out, both those cases would have been susceptible of a short and simple answer if the view then taken of the law had been that in no circumstances could a foreign State claim the assets of a deceased intestate situated in this country, whether the claim was founded on jus regale or on a true right of succession.

The question has also been discussed in various textbooks on this branch of the law. In Dicey, at p. 818, the passage cited above continues: "It does not follow that the decision would "be the same if the law of the domicile was such that the "foreign Treasury claimed as ultimus heres. That would be a "true case of succession and would, it is submitted, be governed "by the law of the domicile." There are also the passages

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[8] [1902] 1 Ch. 847.

[9] [1936] 2 All E.R. 1666.

C. A.
1953

In the Estate of Maldonado, decd.

Jenkins L.J.

in the works on Private International Law by Wolff, Bar and Cheshire, to which Evershed M.R. has referred. I treat those passages as incorporated in this judgment. The conclusion of Barnard J., therefore, has the support of no inconsiderable weight of learned opinion, and although, for my part, I find it difficult to embrace with enthusiasm either side of this highly technical question, his conclusion also commends itself to me on the ground of consistency.

In cases such as the present, English law professes to apply the law of the domicile to the devolution of the intestate's movables situated in this country. If the law of the domicile is that of a foreign State under whose law of intestacy the State itself is the successor, why should English law not give effect to that provision as part of the law of succession which it professes to apply?

The reasons why it is claimed that English law does not do so are expressed in a variety of ways. First, the distinction between succession by a sovereign State and the appropriation of bona vacantia by a foreign State is said to be a mere matter of words. This argument is not without persuasive force, but I do not think that the question can truly be said to be one of distinction without difference. The foreign State can only succeed under its own law of succession where the succession is governed by that law. On the other hand, where the case is not one of succession, but of appropriation of ownerless property, the right applies to any ownerless property which may be reached by the law of the foreign State concerned, irrespective of the law by which its devolution is governed, provided only that by the relevant law it is in fact ownerless.

Second, it is said that the foreign State, being omnipotent so far as its own law of succession is concerned, can constitute itself successor in circumstances in which it could equally well rely on a claim based on jus regale. But in accepting the foreign State's law of succession, English law recognizes the foreign State as being the arbiter of what the succession is to be. The foreign State could, for instance, enact that older relatives should be preferred to younger, or that male relatives should be preferred to female, or vice versa, or even that fair-haired relatives should be preferred to dark-haired; and to such distinctions, unreasonable as they might seem, English law would, as I understand the matter, have no objection. Why, then, should English law stop short of recognizing the foreign State itself as the successor where, according to its own law, it is indeed such? The answer that English law recognizes it to be the function of the relevant foreign law to regulate succession as between individual subjects or citizens, but declines to recognize rights conferred by the foreign State on itself in exercise of that function, does not commend itself to me. It involves distinctions at least as arbitrary and artificial as those discerned by the Crown in the distinction between jus regale and true inheritance by the State. For example, it was, I think, conceded in argument that if the Spanish law of succession provided that in circumstances such as those of the present case the estate of the intestate was to go to some person, or body, or corporation, other than the State itself for application to charitable purposes such as those stated in article 956 of the civil code, there would be no reason why the English courts, in applying the general rule to the inheritance, should not recognize and allow effect to be given to that provision. Why, then, should not the same result ensue where, as here, the estate goes by Spanish law to the Spanish State itself for application to those same charitable purposes?

Third, it is said that private international law is concerned only with the rights of individuals and not with the competing rights of sovereign States. That may well be so. But it is clear that English law recognizes the legitimate proprietary rights of foreign sovereign States, and I see no reason why a right of succession to an intestate's estate should not be held to answer that description.

Fourth, it is said that English law should not recognize as "heir" or "successor" any person not bound by some personal nexus with the deceased. I cannot follow this submission. The heir or successor is surely the person, whether related to the deceased or not, who under the relevant law is entitled to inherit or to succeed.

Fifth, it is said that there is no reciprocity, because Spanish law would not give effect to a claim by the Crown in respect of bona vacantia. But non constat that Spanish law would not recognize a right to succession belonging to the Crown if any such right existed, and it could easily be made to exist by Act of Parliament if that were thought expedient.

There might be a case where a so-called right of succession claimed by a foreign State could be shown to be in truth no more than a claim to bona vacantia. If so, it would, no doubt, be right to apply the recognized exception to the general rule; but this has not been shown to be such a case. On the contrary, it has been found (and the Crown has accepted the finding) that the State of Spain is, in the eye of Spanish law, the true heir; and I would add that, to my mind, notwithstanding what the President said in *In re Musurus*,[10] the conclusion that this is a case of genuine succession is reinforced by the circumstance that the State of Spain is by article 956 of the Spanish Civil Code enjoined to apply the property of the intestate to the charitable purposes therein mentioned.

Accordingly, for the reasons given by Evershed M.R. and such additional reasons as I have been able to offer, I agree that this appeal fails and should be dismissed.

Morris L.J. It is, I think, well settled that where a person dies domiciled in a foreign country our courts will follow and apply the law of that country when dealing with the succession, using that word in a strict sense, to the ownership of movables in this country. The property will go to the persons who become heirs to it according to the law of the domicile. One result of this is that the English courts will, as a rule, make a grant of letters of administration to the person who is constituted the personal representative of the deceased in the country where he was domiciled at his death. It is unnecessary to consider the basis of the recognized principle; it has been said to imply a fiction which deems movables to exist in the place of the domicile of the deceased. The decision in *In re Barnett's Trusts*,[11] concerned a case where, according to the Austrian Code, there was no one to whom distribution of the property could be made. The result was that it became liable under the code to be confiscated as ownerless. The provision to this effect was held by Kekewich J. to be precisely on the lines of the English law as to bona vacantia. As Kekewich J. expressed it [12]: " When there is " no heir, some paramount authority steps in and claims it, not " as against anyone, but because there is no one to claim it at " all." But as the ownerless property was in England he held that the paramount authority to take was the English Crown.

The respondents have not found it necessary to challenge the decision in *In re Barnett's Trusts* [13] which has stood since 1902. They have the firm finding of Barnard J., which was not assailed in this court, that the State of Spain is a genuine heir just as

[10] [1936] 2 All E.R. 1666, 1668.
[11] [1902] 1 Ch. 847.
[12] Ibid. 859.
[13] [1902] 1 Ch. 847.

much as any individual heir according to Spanish law. Sir Lynn, while acknowledging that he must accept that this is the position under Spanish law, submits that the substance of the matter is that the Spanish State is to take in default of there being kindred of the deceased, and he submits that our adoption of the law of the deceased's domicile need not go beyond the stage when it legislates to distribute amongst those having some personal nexus with the deceased, and, in any event, can stop short of any stage at which the State is decreed to take. Although this submission is reasonable and is clearly formulated, I can see no warrant for acceding to it nor authority to support it. It invites the court to lay down new doctrine in one of two alternative forms. It requires partial non-acceptance of the law of succession of the domicile; and the existence of the alternative submissions points to the fact that the court is really being asked to fix in an arbitrary manner some limit to the extent of adoption of the law of the domicile relating to succession. No question arises for consideration in this case whether there might be provisions in a foreign law of such a nature that either on grounds of public policy, or of repugnance to English principles, our courts would not recognize rights to succession given by the foreign law.

I can see no reason why either this country or another should not by law provide that on intestacy the Crown or the State should in certain circumstances inherit. The line in such a case between becoming owner as heir or inheritor by a law dealing with inheritance on intestacy, and acquiring movables because there is no one who is made their owner as heir or inheritor may be fine, but it is, I think, a real distinction. If partial non-acceptance of the foreign law dealing with succession as such is embarked on, the line of such non-acceptance must be arbitrarily drawn. I can see no warrant for differentiating between a provision of the foreign law which on intestacy might, for example, give to remote relatives, and a provision which, for example, might give to some public body whose activities might be generally acceptable.

As it is established in this case, and has not been challenged in this court, that by Spanish law the State of Spain is the heir of the deceased and is as truly the heir as any individual heir would be, I can see no reason why the English courts should decline to recognize this particular heir. In my opinion, the substance of the matter is that by the law to which reference is

C. A.
1953

In the Estate of Maldonado, decd.

made, the property in England is not left ownerless but is to pass to an heir, that heir being the State of Spain. I think that this appeal fails.

Appeal dismissed with costs.
Leave to appeal to House of Lords.

Solicitors: *Treasury Solicitor; Vernor Miles and Clark.*

E. D.

C. A.
1954
Feb. 4.

Singleton, Jenkins and Hodson L.JJ.

GALLER *v.* GALLER.

Husband and Wife—Divorce—Evidence—Adultery—Evidence of participator — Warning — Corroboration — Onus of proof — "Satisfied" —Beyond reasonable doubt—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4.

In divorce proceedings, as in a criminal case, the court must be satisfied beyond reasonable doubt that the matrimonial offence alleged has been committed, and, for that reason, where the offence alleged is adultery, a witness who gives evidence that he or she has committed adultery with a party to the proceedings is in the same position as an accomplice in a criminal case, and a warning must accordingly be given before such evidence is accepted without corroboration.

Fairman v. *Fairman* [1949] P. 341; 65 T.L.R. 320; [1949] 1 All E.R. 938 and *Preston-Jones* v. *Preston-Jones* [1951] A.C. 391; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124 considered.

Appeal from Commissioner Grazebrook.

On March 25, 1952, the husband, Harry Galler, presented a petition for divorce against his wife, Marjorie Phyllis Galler, on the ground that she had deserted him in August, 1948, since when she had never returned to the matrimonial home. By her answer the wife alleged that she had good cause for refusing to live with the husband on the grounds that he had deserted her; had been guilty of cruelty towards her and had committed adultery. At the hearing before the commissioner, after the husband's case had been opened and he had been examined and cross-examined on the issues raised by his petition, it was suggested by the commissioner, and agreed to by counsel on both sides, that it would be convenient for the issue of adultery to be decided first, leaving open the other issues of desertion and cruelty raised by the wife in her answer.

The evidence in support of the allegation of adultery consisted entirely of the evidence of Mrs. Gladys Florence Thompson, the woman with whom the adultery was alleged to have taken place. Mrs. Thompson, in her evidence, said that after the wife had left the husband's house in October, 1948, she (Mrs. Thompson) came to the house in 1950, and acted as nurse for the husband's three children, a boy and two girls. She slept in one room with the two girls and the boy slept in another room with his father. The witness said that she remained as nurse until March, 1952, when she left after a quarrel with the husband. She further stated that she had frequently committed adultery with the husband in her bedroom, and also on one occasion at an hotel in Ramsgate when the family were there on holiday. She also said that while living in the husband's house she had had four miscarriages for which he was responsible, and that she was pregnant by him when she left the house. The evidence given by the witness was uncorroborated by any other evidence and was categorically denied by the husband.

The commissioner was of opinion that the woman was a witness of truth and accepted her evidence. He rejected the husband's evidence denying that adultery had been committed and pronounced a decree in favour of the wife on the ground of the adultery. The husband appealed. The substantial question raised by the appeal, and the only one calling for a detailed report, was as to the nature and the sufficiency of the evidence called in support of the wife's allegation of adultery.

Philip Panto for the appellant husband. The commissioner should not have accepted the uncorroborated evidence of the woman participator in the adultery alleged against the husband. *Fairman* v. *Fairman*[1] showed that where the commissioner was not constrained to accept the evidence of the accomplice rather than that of the spouse, then as a matter of law the court should not accept the evidence of the accomplice. Alternatively, if *Fairman* v. *Fairman*[1] does not go the length suggested, it is submitted that the onus of proof in the case of adultery is similar to that in a criminal case, and the court must be satisfied beyond reasonable doubt: see *Preston-Jones* v. *Preston-Jones*.[2] In the present case it was oath against oath, and the commissioner misdirected himself, or failed to direct himself, as to the strict onus in such a case, and was wrong in accepting the uncorroborated evidence of the woman with whom the petitioner was alleged to have committed adultery, as she was an accomplice. The commissioner only directed himself in the following terms: "The "court must scrutinize her evidence very closely and has to "consider whether she has told the truth." He should have directed himself much more strongly, and should have been very slow to act upon her uncorroborated evidence.

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[1] [1949] P. 341; 65 T.L.R. 320; [1949] 1 All E.R. 938.

[2] [1951] A.C. 391; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124.

G. W. Willett for the respondent wife. The commissioner was entitled to reach the conclusion at which he arrived. It is conceded that there was no actual corroboration of the evidence given by the alleged participator in the husband's adultery, but there was sufficient to justify the commissioner in declining to believe the petitioner's evidence, whereas the woman was unshaken in cross-examination. The cross-examination of the petitioner in relation to the issues of cruelty and desertion [which were not proceeded with] should be regarded as being cross-examination as to credit, and his answers apparently produced an unfavourable view in the commissioner's mind regarding the petitioner's evidence. By section 4 (2) of the Matrimonial Causes Act, 1950, the commissioner had to be "satisfied" that the petitioner had committed adultery (see *Preston-Jones* v. *Preston-Jones* [2]), and he expressed himself in his judgment to that effect. Admittedly, he did not direct himself as to the necessity of requiring corroboration of the participator's evidence, but it is believed that both counsel stressed the desirability of corroboration in their final addresses to the commissioner. The fact, therefore, that the commissioner did not warn himself in his judgment to that effect is not fatal. *Fairman* v. *Fairman* [3] does not require a judge to say that he has given himself a warning in precise terms, and the commissioner here gave a sufficient indication of the necessity for care when he said that the woman's evidence must be carefully scrutinized. His decision, therefore, should be affirmed.

SINGLETON L.J. I will ask Hodson L.J. to deliver the first judgment.

HODSON L.J., after stating the facts and referring to other aspects of the case, continued: This is a case where, there being

[2] [1951] A.C. 391.

[3] [1949] P. 341.

no corroboration of the evidence given by the participator in the adultery alleged, the commissioner has given no indication in his judgment that he had directed himself that where evidence of that kind was given, the court should be very slow to act on it. It is not the law that the court cannot act on the evidence of a person in the position of the witness in this case without corroboration, but it is the law that it is unwise so to do, and that juries must be directed that it is unsafe to act on uncorroborated evidence of this nature, although they are at liberty to do so if they feel sure.

This matter was considered by the Divisional Court in *Fairman* v. *Fairman*,[1] the court consisting of Lord Merriman P. and Ormerod J. The headnote to that case reads: "When a witness "gives evidence in matrimonial proceedings that he or she has "committed adultery with a party to those proceedings, that "evidence must be treated with the same circumspection as the "evidence of an accomplice in the criminal courts. *Ginesi* v. "*Ginesi*[2] applied; *Statham* v. *Statham*[3] and *Rex* v. *Tate*[4] "followed; *Spring* v. *Spring and Jiggins*,[5] disapproved."

In that case the Divisional Court was dealing with an appeal from justices. A man with whom it was alleged that the wife had committed adultery had sworn that he had done so habitually over a period of three years in the bedroom of the wife, who had denied it. The President said[6]: "I have said enough to make it "apparent that the real crux of this case is that the finding of "adultery against this woman depended upon the evidence of "Warner and on his evidence alone; and his evidence is plainly "that of an accomplice. How does the law stand on that basis "and as applied to the facts of this particular case?" The President then referred to the authorities appearing in the headnote which I have named. He first dealt with *Statham* v. *Statham*[7] in this way: "In that case, Russell L.J. called "attention to the fact that there was no evidence of the commis"sion of the offence except the statement of the wife, and "continued: 'The offence of sodomy is an offence of so serious "'a nature that a rule has grown up, that in criminal trials for "'certain offences (which include sodomy) the judge must warn "'the jury of the seriousness of convicting, in the absence of

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[1] [1949] P. 341; 65 T.L.R. 320; [1949] 1 All E.R. 938.

[2] [1948] P. 179; 64 T.L.R. 167; [1948] 1 All E.R. 373.

[3] [1929] P. 131, 150; 45 T.L.R. 127.

[4] [1908] 2 K.B. 680, 682.

[5] [1947] 1 All E.R. 886.

[6] [1949] P. 343.

[7] [1929] P. 131, 143.

"'some evidence to corroborate the story of the other party to "'the act alleged. If no such warning has been given a conviction will be quashed. Notwithstanding the warning the jury "'may convict—but the warning must be given or the "'conviction will not stand.' He then says: 'Is this rule to be "'confined to criminal trials for the offence? I can see no reason "'why it should be so confined'."

The President went on to consider *Ginesi* v. *Ginesi*,[8] which was a case depending, not on a criminal offence, but on proof of adultery; he cited part of the judgment of the court in *Churchman* v. *Churchman*[9]: "'The same strict proof is required in the "'case of a matrimonial offence as is required in connexion with "'criminal offences properly so-called'." He continued: "In "*Ginesi* v. *Ginesi*[10] the Court of Appeal unreservedly approved "that observation in relation to a charge of adultery, in addition, "of course (as Wrottesley L.J. expressly observed at p. 186), to "the connivance; while it left open the question whether the "current generality of the observation applied to other matrimonial offences. Although perhaps it does not arise in the "present connexion, I would like to add a footnote to the phrase "which I then employed, and say that from the beginning of my "tenure of this office I have always directed juries and directed "myself in the same terms where there was a charge of adultery."

Later on the President continued: "It is not enough in a case "of this nature merely to say: 'Here is a witness on one side, "'here is a witness on the other. Which do we prefer?' I "cannot see, I am bound to confess, any trace of a direction "by these justices to themselves in the terms summarized by "Russell L.J. in the passage which I have read from *Statham* v. "*Statham*."[11] He then went on to disapprove of the dictum of Wallington J. in *Spring* v. *Spring and Jiggins*,[12] to the effect that corroboration in such a case was not necessary.

It has been my experience that when evidence of this kind is given in divorce cases it is treated with the caution which I have described for the obvious reason that a charge of this kind is particularly difficult to rebut. Any man who is in the position of being alone in a house with or without children may have a nurse to look after the children, or a housekeeper to look after him, and if that person chooses to make an accusation of this kind against him, it is a matter which he must find very difficult to deny by any affirmative evidence other than his own. A person who is making the accusation is putting forward her own wrongdoing and is in the same kind of position as the position of an accomplice, and it has always been considered that a warning should be given before evidence of that kind is accepted without corroboration.

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[8] [1948] P. 179.

[9] [1945] P. 44; 61 T.L.R. 464.

[10] [1948] P. 179.

[11] [1929] P. 131.

[12] [1947] 1 All E.R. 886.

I have used the language which I have because, since *Fairman* v. *Fairman*[13] was decided, the much debated question whether the standard of proof in a divorce suit, which is a kind of civil action, is the same as that in a criminal case, and whether the same rules apply, has been considered by the House of Lords in *Preston-Jones* v. *Preston-Jones*.[14] In that case Lord MacDermott said: " . . . I am unable to subscribe to the view which, "though not propounded here, has had its adherents, namely, "that on its true construction the word 'satisfied' is capable of "connoting something less than proof beyond reasonable doubt." The subject was the word "satisfied" in section 4 of the Matrimonial Causes Act, 1950, and there had before this case been discussion in this country, and in the High Court of Australia, whether the word "satisfied" meant something less than "satisfied beyond reasonable doubt," and I think that the courts of this country may be taken to have come down on the side of the view that there was no distinction to be drawn between the word "satisfied" standing alone and the word "satisfied" accompanied by the words "beyond reasonable doubt." Lord Simonds expressly assented to and adopted the language of Lord MacDermott.

Lord MacDermott continued: "The jurisdiction in divorce "involves the status of the parties and the public interest "requires that the marriage bond shall not be set aside lightly "or without strict inquiry. The terms of the statute recognize "this plainly, and I think it would be quite out of keeping with "the anxious nature of its provisions to hold that the court might "be 'satisfied,' in respect of a ground for dissolution, with some"thing less than proof beyond reasonable doubt. I should, "perhaps, add that I do not base my conclusions as to the "appropriate standard of proof on any analogy drawn from the "criminal law. I do not think it is possible to say, at any "rate since the decision of this House in *Mordaunt* v. *Mon"creiffe*,[15] that the two jurisdictions are other than distinct. The

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[13] [1949] P. 341.

[14] [1951] A.C. 391, 417; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124.

[15] (1874) L.R. 2 Sc. & D. 374.

C. A.
1954

GALLER
v.
GALLER.

Hodson L.J.

"true reason, as it seems to me, why both accept the same "general standard—proof beyond reasonable doubt—lies not in "any analogy, but in the gravity and public importance of the "issues with which each is concerned."

It might appear from the passages which I have read from the judgment in *Fairman* v. *Fairman*[16] that the analogy of criminal law was the ratio of that decision, but I think that the result is the same by whichever road one travels. In divorce, as in crime, the court has to be satisfied beyond reasonable doubt. I see no reason to depart from the view which I think has always been held, that an adulterer who gives evidence of his own adultery is in the same position as an accomplice in a criminal case. The dangers of relying upon his or her unsupported evidence are great, and a warning should be given.

For this reason, therefore, fortified, as I think it is, by the possible injustice to the husband which may have been done by his cross-examination on issues which were raised in the pleadings but were never determined, although the effect of the cross-examination might have been altered if the case had proceeded in a normal way, I think that there must be a new trial.

JENKINS L.J. I agree that for the reasons given by my brother Hodson the trial of this case cannot be regarded as having been satisfactory, and there should be a new trial accordingly.

SINGLETON L.J. I agree.

New trial ordered.

Solicitors: *Bernard Oberman & Co.; Walmsley & Stansbury for E. W. Marshall, Harvey & Dalton, Bournemouth.*

P. B. D.

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[16] [1949] P. 341.

1953
Oct. 2, 22,
30.

Karminski J.

H. *v.* H.

Husband and Wife—Nullity—Duress—Marriage to escape from Hungary—Fear of political danger—Question of validity.

In the absence of consent there can be no valid marriage; and fear may vitiate consent.

A woman resident in Hungary was anxious in view of the circumstances then prevailing to leave her native country because of her fear of the danger to her life, liberty and virtue. To obtain a foreign passport she went through a ceremony of marriage with a French citizen, and by agreement separated from him immediately thereafter. She was able to escape from her native country, and in due course she presented a petition for nullity of marriage on the ground of alleged duress. No allegation was made against the respondent or his agents:—

Held, that her fears were reasonably entertained, and were of such a kind as to negative her consent to the marriage, which was accordingly void.

United States v. *Rubenstein* (1945) 151 Fed.Rep. (2nd ser.) 915 and *Martens* v. *Martens* [1952] 3 S.A.L.R. 771 considered.

UNDEFENDED PETITION for nullity of marriage.

The following statement of facts is taken from the judgment: The petitioner went through a ceremony of marriage with the respondent in Budapest in the Republic of Hungary in 1949. The petitioner, who sought a decree of nullity against the respondent, alleged that she had been induced to be a party to the marriage ceremony not of her own free will but through fear and duress. She alleged that being in fear at the time of the ceremony of marriage by reason of the circumstances then prevailing in Hungary, she had resolved to escape from that country by means of a marriage or form of marriage to the respondent, who was a French citizen. The petitioner stated that she would never have consented to go through the ceremony of marriage had she not with a good cause been in fear for her life, liberty and virtue.

The respondent did not enter an appearance and took no part in these proceedings. After the case had been opened by counsel for the petitioner and after evidence had been heard, the court adjourned the matter for the assistance of the Queen's Proctor under section 10 of the Matrimonial Causes Act, 1950. The court accepted the evidence given by the petitioner and on her behalf, and the Attorney-General on behalf of the Queen's Proctor did not seek in any way to impeach it.

At the time of the ceremony of marriage the petitioner was a spinster of the age of 18 years, a Hungarian citizen living in Budapest. The respondent, a second cousin, was some six months her junior. He was by birth and nationality a French citizen, and at the time of the ceremony of marriage he too was living in Budapest and was there at school. Both the parties therefore were minors under both English and Hungarian law. It appeared from expert evidence of Hungarian law given by Dr. Keleny that a marriage between parties under the marriageable age, which was 18 for men and 16 for women, was voidable; but that the Minister of Justice could give exemption. The court was informed that registrars of marriage in Hungary invariably obtained the permission or sanction of the Minister before performing the marriage ceremony between parties of whom one or both were under the marriageable age. In any event, the period of time during which this marriage could have been avoided under Hungarian law had passed, and the court was satisfied that this marriage was valid in form by the law of Hungary.

After the ceremony of marriage the petitioner and the respondent separated. The petitioner obtained a French passport and left Hungary, reaching this country after a short period, where she remained resident for at least three years before her petition was presented. [The petitioner relied upon section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, in respect of jurisdiction.] The parties never lived together and the marriage was never consummated. Evidence was given by Mr. Bancroft-Livington, a gynaecologist, that as recently as June, 1953, the petitioner presented on examination all the indications of a virgin.

The circumstances attending the ceremony of marriage were unusual. The respondent was a schoolboy, and it appeared that on the morning of the ceremony he attended school as usual for the first lesson, and obtained leave to absent himself from the second lesson on the pretext that he had to visit his dentist; he went through the ceremony of marriage with the petitioner instead of visiting his dentist, and returned from the office of the marriage registrar in time to take his place at school for the third lesson of the day. The court accepted the petitioner's evidence that before the ceremony was performed she had agreed with the respondent that they should not live together after the marriage, and that it should be dissolved at the earliest possible opportunity. The petitioner had discussed it with her widowed mother, who entirely approved the scheme on the basis that it was the only practicable way in which the petitioner could leave the country.

The reasons why the petitioner was anxious to leave Hungary were as follows. She came of a family engaged in a substantial business and of comfortable circumstances—the kind of family who might not be well or sympathetically regarded by a Communist Government. When Russian troops occupied Hungary in 1945, the petitioner, then about 14 years of age, was dressed as a boy in the hope that thereby she might escape the attentions of the occupying troops. She wore that disguise for a few months and then returned to normal feminine dress. It did not appear that she was at any time molested by Russian or other troops. In 1948 a Communist Government ruled Hungary and the position of the petitioner, and of many others of her class and background, deteriorated. The petitioner undoubtedly heard many stories of people in her position being taken to prison or concentration camps; she believed herself to be in real danger of sharing a similar fate. Asked why she had been so anxious to leave Hungary, she said in her evidence: "Because the time "was so terrible; I was afraid of what was going to happen "there."

Evidence was adduced to show that anxieties of that kind were not peculiar to the petitioner. A friend of hers, now Mrs. A., gave evidence of her own difficulties and anxieties at that time. Mrs. A herself was in 1948 in grave fear of being taken away to a prison or a camp. She, too, was determined to leave Hungary, and went through a form or ceremony of marriage at Budapest in 1949, but in her case to an Austrian stranger, with whom she never lived. That marriage was dissolved and the witness had remarried. There was also evidence by affidavit from a Mrs. P., who had gone with the petitioner to the civil authorities to make the necessary arrangements and who was well aware of the petitioner's motives, namely, that she was going to use her marriage as a means of obtaining a passport whereby she could leave Hungary. Mrs. P. shared fully the fears of the petitioner. Mrs. P. also went through a ceremony of marriage with a foreigner with whom she never lived, left Hungary, and soon afterwards obtained a dissolution of that marriage. Mrs. P., who subsequently remarried, stated that she too had gone through a ceremony of marriage at a time when she was 17 years of age because she was frightened for her liberty and possibly her life. She suggested that she might have purchased safety at the price of becoming the mistress of a Russian officer or official, and her anxieties did not appear to be groundless; so far as her present information went her parents had been deported. An order for her own deportation was believed to have been made, but at the time when it was sought to effect it she had left Hungary.

Soon after the ceremony of marriage the respondent left Hungary and returned to France. Letters written by him from France between 1951 and 1953 made it clear that he regarded his marriage at an end and was anxious to have it annulled or dissolved. His only complaint against the petitioner was in respect of her apparent slowness in obtaining a decree from the courts of this country.

K. E. Shelley Q.C. and *R. L. Bayne-Powell* for the petitioner. English law is applicable: see Hodson J.'s judgment in *Way* v. *Way*.[1]

[KARMINSKI J. But in that case the petitioner was domiciled in England at the time of the marriage; the petitioner here was then domiciled in Hungary.]

The petitioner has, however, at least acquired a quasi domicile in England and it is submitted that the relevant law is that of England. But the point is perhaps academic, as Hungarian law is very similar upon the question of duress. Ayliffe in his Parergon states (at p. 361): "Matrimony ought to be contracted "with the utmost freedom and liberty of consent imaginable"; and his work has been accepted as a "high authority": see *per* Jeune P. in *Moss* v. *Moss*,[2] where concealment by a woman from her husband at the time of her marriage of the fact that she was then pregnant by another man was held not to render the marriage null and void. "Consent" must be the foundation of any true marriage, and that consent is to "the voluntary union for life of "one man and one woman, to the exclusion of all others": *Hyde* v. *Hyde and Woodmansee*.[3] There can be no true consent where there is fear or force.

In *Bell* v. *Graham*,[4] where the certificate of a Gretna Green marriage had been ante-dated, Lord Cranworth M.R. left open the question of duress, finding the marriage valid upon the facts. The earlier authorities are reviewed in *Field's Marriage Annulling Bill*,[5] where the woman had been importuned; but the marriage in that case was not annulled, though it was not consummated. [Reference was also made to *Lady Fulwood's* case,[6] where the death sentence was passed following a "forcible marriage."]

[KARMINSKI J. Those were cases in which there had been fraud or force on the part of the male. Here the lack of consent is said to arise from external circumstances.]

In *Turner's* case[7] duress was found because the woman, then in her sixteenth year, was put in fear of her father's bankruptcy and consented to the ceremony to save him from "total ruin." But there was no threat of personal injury or of bodily fear.

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[1] [1950] P. 71, 78; 65 T.L.R. 707; [1949] 2 All E.R. 959.

[2] [1897] P. 263, 271–3; 13 T.L.R. 459.

[3] (1866) L.R. 1 P. & M. 130, 133.

[4] (1859) 13 Moo.P.C. 242, 259–66.

[5] (1848) 2 H.L.C. 48.

[6] (1638) Cro.Car. 482, 484, 488, 493.

[7] As cited in *Field's Marriage Annulling Bill*, 2 H.L.C. 48, 61.

"The courts of law have always refused to recognize as binding "contracts to which the consent of either party has been obtained "by fraud or duress and the validity of a contract of marriage "must be tested and determined in precisely the same manner "as that of any other contract."[8] In determining whether a contract is to be avoided on the ground of fear, consideration must be given to the character of the person concerned: *Scott (falsely called Sebright)* v. *Sebright*,[8] in which the marriage, induced by threats of shooting, financial ruin and false accusations, threats which seriously affected the petitioner's health, was held void. The court must consider whether there was fear in the mind of the petitioner, not whether or no that fear was reasonable.

[KARMINSKI J. On the facts in the present case, except for the question of jurisdiction, either party might have filed a petition, for the husband might have alleged that he had never consented to the marriage in the true sense, but had merely agreed to help the petitioner to escape.]

He was not, however, in personal fear. In *Cooper* v. *Crane*,[9] when the respondent had threatened to commit suicide, the facts were held insufficient to rebut the presumption of consent. In *Ford* v. *Stier*[10] a decree was granted in a case where the petitioner thought that the marriage ceremony was a betrothal and had gone through it under the influence of her mother. In *Hussein* (orse. *Blitz*) v. *Hussein*[11] the petitioner was constrained through fear, caused by the man's threats to kill her if she did not marry him, to go through the ceremony. There appears to be no direct English authority to assist in such a case as the present, where the fear has not been caused by the respondent. [Reference was made to foreign cases cited in Jackson's Formation and Annulment of Marriage (1950), at pp. 196–7, upon the acquisition of a foreign nationality by marriage.]

[KARMINSKI J. adjourned the case for the assistance in argument of the Queen's Proctor.]

Sir Lionel Heald Q.C., A.-G. and *Colin Duncan* for the Queen's Proctor. The presumption of law is in favour of the validity of marriage, and the principles applicable in cases of of her apparent slowness in obtaining a decree from the courts of this country.

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[8] (1886) 12 P.D. 21, 23, 31; 3 T.L.R. 79.

[9] [1891] P. 369.

[10] [1896] P. 1.

[11] [1938] P. 159; 54 T.L.R. 632.

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[1] [1950] P. 71, 78; 65 T.L.R. 707; [1949] 2 All E.R. 959.

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[3] (1866) L.R. 1 P. & M. 130, 133.

[4] (1859) 13 Moo.P.C. 242, 259–66.

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[KARMINSKI J. adjourned the case for the assistance in argument of the Queen's Proctor.]

Sir Lionel Heald Q.C., A.-G. and *Colin Duncan* for the Queen's Proctor. The presumption of law is in favour of the validity of marriage, and the principles applicable in cases of is the consent of the contracting parties. Ayliffe in his Parergon (at p. 362) states that the consent of the parties contracting is sufficient alone to establish such a marriage. But the consent must be perfect, and fear may vitiate consent. Ayliffe (at p. 361) states his proposition thus: "Matrimony ought to be contracted "with the utmost freedom and liberty of consent imaginable, "without fear of any person whatsoever: for matrimony con-"tracted through any menace or impression of fear is null and "void ipso jure."

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[8] (1886) 12 P.D. 21, 23, 31; 3 T.L.R. 79.

[9] [1891] P. 369.

[10] [1896] P. 1.

[11] [1938] P. 159; 54 T.L.R. 632.

The general doctrine that fear may negative consent to marriage has long been accepted in the courts of this country. In *Moss* v. *Moss*[1] Sir Francis Jeune P. said: "There must be "the voluntary consent of both parties. . . . It has been "repeatedly stated that a marriage may be declared null on the "ground of fraud or duress. But, on examination it will be found "that this is only a way of amplifying the proposition long ago "laid down (in *Fulwood's* case[2]) that the voluntary consent "of the parties is required. In the case of duress with regard "to the marriage contract, as with regard to any other, it is "obvious that there is an absence of a consenting will."

In *Scott* v. *Sebright*[3] Butt J. stated the principle thus: "Whenever from natural weakness of intellect or from fear—"whether reasonably entertained or not—either party is actually "in a state of mental incompetence to resist pressure improperly "brought to bear, there is no more consent than in the case of "a person of stronger intellect and more robust courage yielding "to a more serious danger. The difficulty consists not in any "uncertainty of the law on the subject, but in its application to "the facts of each individual case."

In *Scott* v. *Sebright*[3] Butt J. was considering facts very different from those in the present case. There the petitioner complained that the respondent had threatened that unless she married him he would shoot her, would ruin her financially and would accuse her to her mother and in every drawing-room in London of having been seduced by him. This last suggestion was wholly false and, indeed, the petitioner was proved to be virgo intacta. In the present case it is not suggested that the fears of the petitioner derived from any action by the respondent or from any default on his side. Indeed, he is represented as a youth of blameless character, who was willing to help the petitioner even at some possible risk to himself.

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[1] [1897] P. 263, 268; 13 T.L.R. 459.

[2] (1638) Cro.Car. 482, 488, 493.

[3] (1886) 12 P.D. 21, 24.

So far as has been revealed by the industry of counsel, there appears to be no case reported where fear or duress emanated from any other source than from the respondent or his servants or agents. An analysis of some of the earlier cases is to be found in Sir Fitzroy Kelly's argument in *Field's Marriage Annulling Bill.*[4] In the majority of the cases there discussed the petitioners were of tender years but ample income. In some of the cases violence was used as well as threatened.

It was argued by the Attorney-General that the facts of the present case cannot be said to prove that the ceremony of marriage was performed under fear or duress, and he rightly emphasized, and I accept, that the principles are strict and should not be rashly extended. He argued further that a mental reservation as to a vital condition of marriage does not vitiate its validity, though the reservation itself may be bad as against public policy. Thus in *Brodie* v. *Brodie* [5] Horridge J. held that an agreement entered into by the parties before marriage to live apart thereafter was illegal and void. But it was not argued, or suggested, in that case that because of such a reservation by the parties the marriage was itself void or voidable. On the contrary, Horridge J. affirmed the validity of the marriage by a decree of restitution of conjugal rights.

I agree entirely with the Attorney-General's proposition that mental reservations cannot avoid a marriage. And I also entirely agree with his argument that the court must be slow to pronounce against the validity of a marriage perfect in form and celebrated between apparently competent parties: even when, as in this case, it is difficult to withhold a feeling of sympathy with the present difficulties of the parties. There is no doubt that the presumption of law is in favour of the validity of a marriage in form duly celebrated: but the presumption is rebuttable by evidence. The English and Irish cases and the principles to be derived from them have been carefully examined by Haugh J. in an Irish case, *Griffith* v. *Griffith.*[6] There a man was induced to go through a ceremony of marriage under the threat that he would otherwise be prosecuted for carnal knowledge of a woman under seventeen. The threat was in fact false to the knowledge of the woman, but the petitioner was put in fear by it and Haugh J. found as a fact that the petitioner married under the duress caused by such fear. Duress, as Haugh J. explained [7] " must be a question of degree, and may begin from a gentle form

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[4] (1848) 2 H.L.C. 48.

[5] [1917] P. 271, 273; 33 T.L.R. 525.

[6] [1944] I.R. 35.

[7] Ibid. 42.

"of pressure to physical violence, accompanied by threats of "death." I respectfully agree, adding only my own view that the question of degree is a question of fact for the court.

In the course of argument my attention was drawn to *United States* v. *Rubenstein*,[8] a decision of the United States Circuit Court of Appeals. That was an appeal from a conviction on a charge of conspiracy to obtain the entry of an alien into the United States by false representations and by the wilful concealment of material facts. A Czechoslovak woman married an American man in order to stay in the United States: the man received $200 from the woman, and both agreed that a divorce should take place six months after the marriage. Hand J. found[9] that the suppression of these material facts was a fraud even though the marriage was valid. But he went on to assert that the man and woman were never married at all. "Mutual "consent" he said "is necessary to every contract: and no "matter what forms or ceremonies the parties may go through "indicating the contrary, they do not contract if they do not in "fact assent, which may always be proved . . . if the spouses "agree to a marriage only for the sake of representing it as such "to the outside world and with the understanding that they will "put an end to it as soon as it has served its purpose to deceive, "they have never really agreed to be married at all. They must "assent to enter into the relation as it is ordinarily understood, "and it is not ordinarily understood as merely a pretence, or "cover to deceive others."

The South African courts have more recently taken a different view. In *Martens* v. *Martens*[10] Clayden J. had to consider a suit for a declaration of nullity or, in the alternative, for a decree of restitution in the following circumstances: a Greek woman living in Greece desired to enter the Union of South Africa in order to live with a married man there residing. In order to secure admission into the Union the Greek woman had to satisfy the authorities that she was coming there to get married, and for that purpose she engaged herself to marry another man resident in South Africa. This man she deserted immediately after the ceremony of marriage and went to live with the married man. There was no suggestion that the Greek woman was in any personal difficulty in Greece or under any apprehension of danger to herself in that country. Dealing with these facts Clayden J.

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[8] 151 Fed.Rep. (2nd ser.) 915.

[9] Ibid. 918.

[10] [1952] 3 S.A.L.R. 771.

said[11]: "It seems to me that the facts show that the parties "did intend that the defendant should become the wife of "the plaintiff. That was the very object of the ceremony, so "that she could remain in this country, and that object was "brought about with a realization by both contracting parties "that there would be need for divorce to end the marriage. As "explained later, any agreements contrary to the relationship "of marriage must be disregarded. The action for a declaration "of nullity of marriage must be dismissed."

In both *United States* v. *Rubenstein*[12] and in *Martens* v. *Martens*[13] the primary object of the marriage was in each case to evade, or at least to circumnavigate, the immigration laws of the United States and of the Union of South Africa respectively. In neither case can I find evidence that the ceremony of marriage was entered into under any fear. It is true that the two courts appear to have come to different conclusions, and, indeed, they were administering different codes of law. With the greatest respect to the persuasive authority of any decision of Hand J. I find the reasoning of Clayden J. the more convincing in its relation to English law.

If the present case was devoid of the element of fear I should be compelled to find that the parties to the present suit intended that the petitioner should become the wife of the respondent. It was conceded in argument by the Attorney-General that if it had been announced before this ceremony of marriage by the Hungarian authorities that all single women would be put into brothels, a woman might marry with no other intention than to escape that particular fate. But he argued further that the essence of the marriage between the petitioner and the respondent in this case was to obtain a passport. It is true that the petitioner here was anxious, and indeed desperately anxious, to obtain a passport which would enable her to escape from Hungary; but I have to inquire into the reason why she was so desperately anxious to leave her native country.

That reason I believe to have been fear of the danger which would imperil her if she remained in Hungary, and I must find on the evidence of the petitioner herself and of Mrs. A. and Mrs. P. that her fears were reasonably entertained. I find that the fear entertained by the petitioner was of such a kind as to negative her consent to the marriage. In the absence of consent there can be no valid marriage. There was here neither

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[11] [1952] 3 S.A.L.R. 771, 775.

[12] 151 Fed.Rep. (2nd ser.) 915.

[13] [1952] 3 S.A.L.R. 771.

1953

H. *v.* H.

consent nor valid marriage. I find the contents of the petition proved and decree accordingly that the marriage in fact celebrated between the petitioner and the respondent is null and void.

Decree nisi of nullity.

Solicitors: *Woodham Smith, Borradaile & Martin; The Treasury Solicitor.*

J. B. G.

1953
July 27, 28,
29, 30, 31.

Willmer J.

BRIGHT *v.* BRIGHT.

Husband and Wife—Divorce—Estoppel per rem judicatam—Previous petition alleging cruelty and adultery dismissed—Second petition alleging desertion—Unreasonable delay—Petitioner resident abroad—Fruitless proceedings.

Divorce. Estoppel (per rem judicatam).

There is a distinction in matrimonial proceedings between an estoppel as against a person charged with an offence and an estoppel as against a person putting a charge forward. It is one thing to say that a petitioner cannot get relief in the Divorce Division simply because the respondent is estopped from denying the charges, for in such cases the public interest will no doubt intervene to see that relief is not improperly obtained by a petitioner merely through some technical rule. But no interest of the public is infringed by a petitioner being estopped from repeating, merely in order to obtain relief, allegations which have been the subject of judicial determination.

Winter v. *Winter* [1942] P. 151; 58 T.L.R. 365; [1942] 2 All E.R. 390; *Hudson* v. *Hudson* [1948] P. 292; 64 T.L.R. 258; [1948] 1 All E.R. 773 distinguished.

After a wife's petition alleging cruelty of a violent nature and adultery had been dismissed, the court accepting the husband's denial of the charges made against him, a fresh petition was presented by her on the ground of (constructive) desertion, in which reliance was placed upon the husband's alleged conduct during a period included in the earlier petition. The husband contended that the wife was estopped from raising such allegations by reason of their similarity to those considered in the previous proceedings:—

Held, (1) that the wife was estopped from reiterating in support of her plea of constructive desertion previous allegations of violence and threats of violence upon which specific findings had been made against her, for they were by their nature allegations of acts which were either cruelty or, if they were not acts of cruelty, acts which could not be relied on as "grave and weighty" matters to support a charge of constructive desertion. They could not be put forward as "grave and weighty" matters other than cruelty on the ground, for instance, that they were not calculated to injure health, or did not involve any intention to injure.

Pike v. *Pike*, ante, 81n.; [1953] 1 All E.R. 232; *Timmins* v. *Timmins* [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187 considered and applied.

Dixon v. *Dixon* [1953] P. 103; [1953] 1 All E.R. 910; *Foster* v. *Foster*, ante, 67; [1953] 2 All E.R. 518 distinguished.

Held, (2) that the wife was estopped from raising certain matters not specifically raised before on the ground that those allegations could well have been put forward as part of the previous case of cruelty if they were allegations of substance.

Hoystead v. *Commissioner of Taxation* [1926] A.C. 155, 170; 42 T.L.R. 207 applied.

Held, (3) that the wife was estopped, after the finding against her on the issue of adultery, from relying in support of her allegation of constructive desertion upon her alleged suspicions about her husband's relationship with the woman previously named.

Allen v. *Allen* [1951] W.N. 322; [1951] 1 All E.R. 724 applied.

Held, (4) that a further allegation, by way of amendment, in which was raised a charge of simple desertion not previously investigated, ought not to be struck out.

The question of unreasonable delay where the petitioner previously resided abroad in the country of her domicile, and had presented a previous petition on different grounds, in this country, considered.

PRELIMINARY point on defended petition for divorce.

The parties were married in Sierra Leone, the country of their birth, in 1911. They remained domiciled in that country, where the husband had his home, up to the hearing of this suit.

On April 30, 1932, the wife presented a petition in the Supreme Court of Sierra Leone for a judicial separation on the ground of cruelty. The matter never came to trial, but was never formally terminated by either side. There was no subsequent resumption of cohabitation. Various other proceedings in the Freetown courts concerning questions of property were litigated between the parties before the wife left Freetown in 1942. She came to live in England in that year, and on December 16, 1949, she acquired a right for the first time, under section 1 of the Law Reform (Miscellaneous Provisions) Act, 1949 (now section 18 (1) (*b*) of the Matrimonial Causes Act, 1950), to petition for divorce in this country. Prior to 1932 the parties had visited England on various occasions and for various periods.

In April, 1950, the wife filed a petition for divorce in the High Court alleging cruelty and adultery. The nature of the charges is set out below. The husband denied the allegations, and after a hearing lasting some days Mr. Commissioner Bush-James Q.C. dismissed the petition on January 22, 1952.

On October 2, 1952, the wife presented a second petition for divorce on the ground of (constructive) desertion. The petition was served in Freetown on October 31, 1952, but owing to a misunderstanding no appearance was entered, and after an application to the judge on January 23, 1953, for an expedited hearing on the ground that a witness had to return to the Gold Coast, the case was heard in the undefended list, and a decree nisi granted, on February 9, 1953. When the husband learnt of the decree he made application to the Divisional Court for a rehearing under rule 36 (1) of the Matrimonial Causes Rules, 1950. A rehearing was ordered on June 23, 1953, and the husband filed an answer forthwith denying desertion.

By her petition dated October 2, 1952, the wife alleged in paragraph 8: "That the respondent has deserted the petitioner "without just cause for a period of three years and upwards "immediately preceding the presentation of this petition, to wit, "from and since about the month of March, 1932. The circum-"stances of the desertion are set out in paragraphs [9 to 18]." Paragraph 18 read: "That by his conduct as aforesaid the "respondent evinced an intention to drive the petitioner from "the matrimonial home with the object of bringing cohabitation "between the petitioner and the respondent permanently to an "end; and that the petitioner was thereby in or about the month "of April, 1932, driven from the matrimonial home at the White "House, Freetown, aforesaid, and has not thereafter returned "to cohabitation with the respondent and her health has been "damaged by the respondent's treatment of her."

Paragraphs 9 to 17 are grouped below in the order in which the decision of the court was given; the relevant paragraphs and charges in the petition of April, 1950, are given in brackets.

Paragraphs 14, 15 and 17: "14. That in or about the year "1927 at the White House, Freetown, aforesaid, the respondent "threatened the petitioner with a revolver" ("That in or about "1927 at the White House, Freetown, aforesaid, the respondent "drew a revolver from his pocket and threatened to shoot the "petitioner"). "15. That in or about the year 1928 at the "White House, Freetown, aforesaid, the respondent threatened "to throw the petitioner out of the house, and in fact threw "some of her belongings out of a window and told her to go" ("That in or about 1928 the respondent, who frightened the "petitioner by the violence of his temper, threw several of her "belongings out of the window of the White House, Freetown, "aforesaid, and threatened to throw her out of the house"). "17. That in or about the month of March, 1932, at the White "House, Freetown, aforesaid, the respondent threatened the "petitioner with a knife, broke one of her fingers by twisting it, "and struck her a violent blow on her right eye with his clenched "fist" ("That in or about the early part of 1932, at the White "House, Freetown, aforesaid, the respondent advanced towards "the petitioner with a knife in his hand, threatening to attack "her. A violent struggle took place between the respondent and "one J. T-M., a nephew by marriage of the petitioner, who was "present and who came to her assistance. The respondent's "knife was taken from him, but he broke free, seized the wife "by her left hand and broke her finger by twisting it. He then "struck the petitioner a violent blow with his clenched fist in her "right eye").

Paragraphs 9, 12 and 13 (which contained allegations not specifically made in the previous proceedings): "9. That from "about the year 1926 the attitude of the respondent towards the "petitioner changed and the respondent frequently quarrelled "with and abused the petitioner." "12. That between the years "1927 and 1930 the respondent habitually kept the petitioner "short of money." "13. That between the years 1927 and "1930, at the White House, Freetown, aforesaid, the respondent "frequently told the petitioner that he no longer wanted her and "wished that she would go."

Paragraphs 10 and 11: "10. That during the year 1927 the "petitioner received a letter from the respondent, who was in "England, from which the petitioner became suspicious that the "respondent was carrying on an improper association with his "half-sister, L. B-T." "11. That when the respondent returned "to the matrimonial home, the White House, Freetown, Sierra "Leone, he refused the petitioner's request that he should see "less of the said L. B-T., and relations between the petitioner "and the respondent became further strained." (The previous petition alleged adultery with L. B-T. in England during four months of 1927 and during the last six months of 1930, and also in Freetown in 1940, 1941 and 1949.)

Paragraph 8, quoted above, was amended to read: "8. That "the respondent has deserted the petitioner . . . from and since "about the month of June, 1930, or shortly thereafter."

Paragraph 16: "That in or about the month of April [amended "to June], 1930, at 18, Albany Road, Stroud Green, in the "county of London, when the petitioner refused to share a bed-"room with the said L. B-T., the respondent refused to stay in "the same house with the petitioner, and left forthwith to find "alternative accommodation with the said L. B-T., and the "respondent did not return to the petitioner while they remained "in England." The final words "and the respondent did not "return . . . etc." were deleted by amendment, as were the words at the end of paragraph 18: "and that the petitioner was thereby "in or about the month of April, 1932, . . . etc."

The petition of April, 1950, contained, in addition to the general allegation of cruelty and injury to health, the following allegations: "That in or about 1913, at Park House, Garrison "Street, Freetown, aforesaid, the respondent struck the petitioner "a violent blow on the thumb with a stick, breaking the skin and "causing severe bruising"; "That in or about 1915, at Park "House, Freetown, aforesaid, the respondent pushed the peti-"tioner violently against the corner of a bedpost, and her left eye "was thereby severely cut and bruised"; "That in or about "1927, at the White House, Freetown, aforesaid, the respondent "struck the petitioner a violent blow on the head with a shoe"; "That in January, 1932, when the petitioner was living apart "from the respondent at the White House, Freetown, aforesaid, "the respondent, in an angry and threatening manner, entered "the said house with some half-dozen persons against the will "of the petitioner and forced her to run from the house and seek "the protection of the police"; "That from the early days of "the marriage the respondent caused the petitioner great distress "and anxiety by his frequent demands for large sums of money."

By his answer in the present proceedings the husband respondent denied that he had deserted the wife and alleged: "That "if the attitude of the respondent changed in the year 1926, as "alleged in paragraph 9 of the petition, such change was not due "to any act or default on the part of the respondent but was "wholly attributable to the conduct of the petitioner, and to her "violent hostility to the respondent." "That the respondent "denies that the petitioner ever became suspicious that he was "carrying on an improper association with his half-sister L. B-T. "as alleged in paragraph 10 of the petition, and that if she did "entertain any such suspicions, such suspicions were groundless "and that the allegation of the said alleged association were "exhaustively litigated before and pronounced against by Mr. "Commissioner Bush-James Q.C. . . ."

In addition to traversing the remaining allegations the husband alleged that the wife had importuned him between 1927 and 1930 to give her a divorce, and that she had left in April, 1932, of her own free will, and he pleaded that paragraphs 14, 15 and 17 were "identical in substance" with paragraphs in the previous petition, and that "the petitioner ought not to be admitted to "plead desertion and is estopped from pleading that she had just "cause as alleged in paragraph 8 of her petition on the ground "that she is seeking to re-litigate matters which had already been "determined in the judgment of Mr. Commissioner Bush-James "Q.C. The merits of the said pleas are res judicata."

Following the amendments to the petition, the answer was amended to deny desertion in 1930, alleging that the petitioner had refused to cohabit with the respondent in England, that in 1931 the respondent had requested the petitioner to return to him, that the petitioner had asked him in 1931 to commit adultery so that she might divorce him, thereby expressing a consent to the separation, and that cohabitation had in fact been resumed between January 31, 1932, and April 17, 1932. By her reply the petitioner, inter alia, denied the sincerity of any purported offer of reconciliation by reason of his alleged behaviour.

J. E. S. Simon Q.C. and *Elliot Gorst Q.C.* for the husband respondent. The wife is estopped per rem judicatam from raising the allegation of constructive desertion. The matters alleged were all raised, or should have been raised, on the previous petition. Except for the allegations arising out of the husband's alleged association with the woman previously named, the allegations are of conduct which either was, or might have been, put forward in support of a charge of cruelty: they are not allegations of conduct which could not amount to cruelty because, for example, of an absence of intention. [*Pike* v. *Pike* [1] and *Timmins* v. *Timmins* [2] were referred to.]

Once proceedings have been begun, in which cruelty is alleged, the whole case must be put forward: one cannot keep back half of the case for a further attempt, although earlier matters may be reviewed in the light of subsequent conduct. [Reference was made to *Hoystead* v. *Commissioners of Taxation* [3] as the leading case.]

Although the High Court is not estopped in the exercise of its statutory duties in matrimonial causes by a decision of a court of summary jurisdiction, there is an estoppel where the previous decision has been one in the High Court: *Finney* v. *Finney*.[4] [Reference was also made to *Harriman* v. *Harriman*,[5] *Winnan* v. *Winnan*,[6] *Sopwith* v. *Sopwith*[7] and *Wilkins* v. *Wilkins*.[8]]

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[1] Ante, 81n.; [1953] 1 All E.R. 232.

[2] [1953] 1 W.L.R. 757, 761.

[3] [1926] A.C. 155; 42 T.L.R. 207.

Although in *Dixon* v. *Dixon*[9] Davies J. refused to take the "summary course" of striking out the pleading upon a submission that the issues were res judicata, that case is distinguishable from the present because there were no definite findings in the previous judgment except that the allegation of cruelty had not been made out.[10] Here the court has before it a judgment which makes specific findings of fact, including a finding that certain matters alleged never took place at all. The present case is also to be distinguished from *Foster* v. *Foster*,[11] for in that case conduct was relied on which took place after the date of the original summons, and there was also evidence of words of expulsion on the second summons.

The petitioner is estopped from alleging any impropriety between the husband and the woman previously named, for there has been a definite finding not only that there was no adultery, but that the charges of adultery ought never to have been made. This case is much stronger on the facts than *Allen* v. *Allen*,[12] where there had been grounds for some suspicion although adultery had not been proved.

Christopher Shawcross Q.C. and *R. T. Barnard* for the wife petitioner. It was held in *Foster* v. *Foster*[13] that the wife was not bound to put forward a charge of desertion in the first court under penalty of estoppel. In that case, as in this, there were words of expulsion in addition to acts of alleged cruelty. Reliance is also placed on *Dixon* v. *Dixon*.[14]

The court cannot be estopped in matrimonial causes since a question of status which may involve third persons is involved. [*Winter* v. *Winter*[15] and *Hudson* v. *Hudson*[16] were referred to.]

[WILLMER J. But in this case it is the petitioner who is alleged to be estopped by a High Court finding.]

Simon Q.C. in reply. The doctrine of estoppel per rem judicatam applies in divorce proceedings in respect of charges which it is sought to make, although different conclusions may be reached where such charges are made by way of defence. It is also applicable where the facts previously put forward as cruelty are later alleged as supporting desertion. Even if the doctrine does not apply to all the charges made, it cannot be excluded.

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[4] (1868) L.R. 1 P. & M. 483.

[5] [1909] P. 123; 25 T.L.R. 291.

[6] [1949] P. 174; 65 T.L.R. 22; [1948] 2 All E.R. 862.

[7] (1860–1) 2 Sw. & Tr. 160.

[8] [1896] P. 108; 12 T.L.R. 212.

[9] [1953] P. 103; [1953] 1 All E.R. 910.

[10] [1953] P. 103, 107–8.

[11] Ante, 67; [1953] 2 All E.R. 518.

[12] [1951] W.N. 322; [1951] 1 All E.R. 724.

[13] Ante, 67.

[14] [1953] P. 103.

[15] [1942] P. 151; 58 T.L.R. 365; [1942] 2 All E.R. 390.

[16] [1948] P. 292, 298; 64 T.L.R. 258; [1949] 1 All E.R. 773.

WILLMER J. This case arises out of a wife's petition for divorce on the ground of desertion. In its present form the petition constitutes a plea of constructive desertion, for it is alleged that on a date in April, 1932, the wife, by reason of the husband's conduct, was driven out of the matrimonial home. However, I am not now concerned with the detailed facts of the case. For the moment I have to deal with two preliminary questions which have been raised on the threshold of the trial. On the one side the husband contends that the wife is estopped per rem judicatam from raising the allegations which she now seeks to raise in her effort to show that the husband was guilty of desertion by driving her out. The reason for that contention is that there was a previous petition by the wife against the husband on the grounds of cruelty and adultery. That petition was heard by Mr. Commissioner Bush-James in January, 1952, and was dismissed. It is contended on behalf of the husband that all the allegations which are now put forward in support of the plea of constructive desertion were either put forward and dismissed in the course of the previous proceedings or else are such that they could and ought to have been put forward as part of the case which was then presented. On those grounds it is urged that the wife petitioner ought not to be allowed to litigate again what amounts to substantially the same case as she sought to put forward on the previous occasion.

On the other side the wife asks leave to amend her petition by including an alternative plea of simple desertion on a date in April, 1930. It is not suggested, nor I think can it be suggested, that such a plea would be barred by any estoppel arising out of anything decided in the previous case, but it is urged upon me on behalf of the husband that if I accede to the husband's application and refuse to allow the wife to put forward her allegations of constructive desertion, I ought not, especially at this very late stage, to allow her to make such a very radical amendment of her case. On the other hand, if I allow all, or some at any rate, of the wife's allegations of constructive desertion to stand, then, as I understood Mr. Simon, it is conceded that it would be difficult to resist the wife's application to amend. But I was reminded that in that event I ought to consider very carefully what terms as to costs I ought to impose.

The questions raised on both sides are difficult. They are also important, because it may very well be that the determination of the matters raised before me now may conclude the case. I should have welcomed an opportunity of reflecting on the questions raised before me, and I should have wished, had it been possible, to put my judgment into writing. But I feel that that course is not open to me. The case, if it is to be tried, should be tried at once. All the witnesses are here, many of them having had to be assembled from West Africa. I have therefore come to my decision, and will give my reasons for it.

It was pointed out on behalf of the wife, quite properly, that this is a very unfortunate way of dealing with an application of this sort. The proper way to deal with it would have been to apply in chambers before trial for an order striking out the offending part, or parts, of the petition, so as to get these questions decided without waiting for the trial, and without incurring the expense of collecting the witnesses and making all the other preparations for trial. However, that course was not taken and, unfortunate as it may be that it was not, I do not think that it affects the merits of the application; it only goes to the question of costs. It remains true to say that if the wife is estopped by reason of the judgment in the previous proceedings it would clearly be wrong for me to allow the present suit to proceed.

On the main question I have come to the conclusion that the wife is estopped per rem judicatam from raising any of the allegations in the petition which go to support her plea of constructive desertion. That, as I see it, involves paragraphs 9 to 15 of the petition, both inclusive, and also paragraphs 17 and 18. It does not, however, so far as I can see, touch paragraph 16, which alleges that in April, 1930, the husband refused to stay in the same house as the wife and left forthwith to find alternative accommodation. I cannot see that anything was decided in the previous proceedings which would involve any estoppel against the wife from raising that allegation. That is an allegation of a physical separation induced by the act of the respondent husband in April, 1930, and it leads me at once to the amendment asked for by the wife, namely, to raise the allegation of simple desertion in April, 1930. That ties up with what is alleged in paragraph 16 of the petition, and as I cannot see that there is any estoppel against that allegation it seems to me that

I ought to allow leave to amend. That order will, of course, be subject to some terms as to costs, and also to the husband being granted leave to amend his answer, if desired.

In giving the reasons which have led me to that conclusion, it is necessary to begin by stating something of the historical background of the marriage. The marriage took place in 1911, in West Africa, where both the parties were domiciled and, indeed, where the husband is still domiciled. During most of the period of cohabitation they resided together in West Africa. They were in England during the year 1930, which covers the date when it is alleged that the husband left the wife. Subsequently they both returned to West Africa, and there appears to be some question whether there was not thereafter a resumption of cohabitation for a short time. It is common ground that they never lived together after April, 1932. On April 30, 1932, the wife instituted proceedings in the West African court for judicial separation on the ground of cruelty. For some reason, which has not so far been explained to me, that proceeding never came to trial. So far as I know, it is still on the file of the West African court. The parties continued to live separate and apart, and in 1942 the wife came to this country, where she has resided ever since. The respondent husband, on the other hand, remained in West Africa, where he carried on practice as a medical practitioner.

The wife acquired for the first time a right to proceed in this country by virtue of section 1 of the Law Reform (Miscellaneous) Provisions) Act, 1949. That section, which is now replaced by section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, came into force on December 16, 1949; and in fact the wife launched a petition based on allegations of cruelty and adultery on April 21, 1950. That petition was heard, as I have said, by Mr. Commissioner Bush-James in January, 1952, when he dismissed the petition and found that neither the cruelty nor the adultery alleged had been proved. The present petition was presented on October 2, 1952. For some reason there was some oversight which resulted in the case finding its way into the undefended list. It was tried by one of the commissioners as an undefended cause on February 9, 1953, and a decree nisi was granted. When the husband heard of the decree, he made application to the Divisional Court in pursuance of rule 36 of the Matrimonial Causes Rules, 1950, an order for rehearing was made on June 23, 1953, and this is the rehearing which was then ordered to take place.

Summarizing the objections taken by the husband to the allegations in the petition, paragraphs 10 and 11, which raise allegations of an association between the husband and his half-sister, and are said to have prompted suspicions in the mind of the wife, are objected to on the ground that it is no longer open to the wife to allege that she had any reasonable grounds for suspicion, having regard to the finding of the commissioner that the association complained of was not in fact a guilty association. On that point the husband relies on the decision of the Court of Appeal in *Allen* v. *Allen*,[1] which made it clear that, once the court has decided that a charge of adultery has not been proved, it is no longer open to the complaining party to say that he or she had reasonable ground for believing in such adultery.

Paragraphs 14, 15 and 17 raise allegations of threats of violence or of actual assault, and as to these it is objected that they are mere repetitions of allegations made in the previous petition and expressly dealt with by the commissioner in his judgment, whereby he found that the allegations made were not proved. He came to the conclusion that nothing which the husband did in the way of threats or assault amounted to cruelty, and, in those circumstances, it is said that the same allegations cannot now be raised in support of a plea of constructive desertion. In support of that contention I was referred to the decision of the Court of Appeal in *Pike* v. *Pike*,[2] and particularly to the remarks of Hodson L.J. and Denning L.J. In that case an attempt was made to set up a case of constructive desertion by alleging acts which, if they were anything at all, were acts of cruelty, and the Court of Appeal decided that a party desiring to put forward such a case must come out into the open and charge cruelty. Hodson L.J. said[3]: "I "want to make it as clear as I can that when the case sought "to be made is in the nature of a case of cruelty, it is not possible "to build up a case of constructive desertion by what is really a "case of unproved cruelty. That, of course, does not cover the "whole area of constructive desertion, for grave and weighty "matters might be alleged which are quite different in kind and "quite as serious, if not more serious, than cruelty." It is said that in the present case the wife is trying to build up a case of constructive desertion by what is really a case of unproved cruelty. Denning L.J. said[4]: "In the circumstances of this "case, the husband's conduct was either cruelty or it was not. "It was not something different from cruelty. For the wife to "justify her refusal to return, the only thing she could rely on "would be the husband's cruelty, and in such a case cruelty "must be pleaded and proved."

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[1] [1951] 1 All E.R. 724; [1951] W.N. 322.

[2] Ante, 81n.; [1953] 1 All E.R. 232.

[3] Ante, 87.

The observations of Denning L.J. were developed and explained by him in *Timmins* v. *Timmins*,[5] where he said[6]: "We "were referred to *Pike* v. *Pike*,[7] and, in view of some comments "made on it by Davies J. in *Dixon* v. *Dixon*,[8] I think that I "ought to explain some of the things which I there said. In "considering whether one party has good cause for leaving the "other, much depends on whether the conduct complained of is "of a 'grave and weighty' character or not. Conduct which is "of a grave and weighty character may sometimes fall short "of cruelty because it lacks the element of injury to health (as "in *Russell* v. *Russell*[9] and *Edwards* v. *Edwards*[10]), or because "it lacks the element of intent to injure (as in the case of "drunkenness or association with other women); but nevertheless "it may give good cause for leaving, as the cases which I have "cited earlier amply show. On the other hand, conduct which "is not 'of a grave and weighty character,' and is for that reason "not cruelty, does not give good cause for leaving: see *Yeatman* "v. *Yeatman*.[11] It is conduct of that kind to which I referred "in *Pike* v. *Pike*[12] when I said that conduct 'less than cruelty' "does not justify a spouse in leaving. In the present case the "conduct of the husband was, I think, of a grave and weighty "character, and the only reason why it was not cruelty was "because there was no intent to injure. It comes, therefore, "within the earlier cases to which I referred."

In the present case it is suggested that the conduct complained of comes within the latter class referred to by Denning L.J.; that is to say, that the acts relied on by the wife were either acts of cruelty, or else they were not grave and weighty matters at all. That being so, since the commissioner decided that they were not acts of cruelty, they cannot be relied on as grave and weighty matters justifying the allegation of constructive desertion.

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[4] Ante, 88.

[5] [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187.

[6] [1953] 1 W.L.R. 761.

[7] Ante, 81n.

[8] [1953] P. 103; [1953] 1 All E.R. 910.

[9] [1895] P. 315, 334; 11 T.L.R. 579.

[10] [1950] P. 8; 65 T.L.R. 419; [1949] 2 All E.R. 145.

[11] (1868) L.R. 1 P. & M. 489.

[12] Ante, 81n., 88.

1953

BRIGHT
v.
BRIGHT.

Willmer J.

Paragraphs 9, 12 and 13 relate to matters which appear not to have been specifically raised in the previous proceedings. But it is argued that all the matters alleged could, if true, have been raised in support of the charge of cruelty then made. That being so, it is contended that the court ought not now to entertain them, more especially having regard to the general principles relating to estoppel which have been laid down in the decided cases. The locus classicus to which I was referred in this connexion is *Hoystead* v. *Commissioner of Taxation.*[13] In giving the judgment of the Privy Council, Lord Shaw stated the principle in the following oft-quoted words [14]: "It is seen from this citation of authority "that if in any court of competent jurisdiction a decision is "reached, a party is estopped from questioning it in a new legal "proceeding. But the principle also extends to any point, "whether of assumption or admission, which was in substance the "ratio of and fundamental to the decision. The rule on this "subject was set forth in the leading case of *Henderson* v. *Henderson* [15] by Wigram V.-C. as follows: 'I believe I state the "'rule of the court correctly when I say, that where a given "'matter becomes the subject of litigation in, and of adjudication "'by, a court of competent jurisdiction, the court requires the "'parties to that litigation to bring forward their whole case, and "'will not (except under special circumstances) permit the same "'parties to open the same subject of litigation in respect of "'matter which might have been brought forward as part of the "'subject in contest, but which was not brought forward, only "'because they have, from negligence, inadvertence, or even "'accident, omitted part of their case. The plea of res judicata "'applies, except in special cases, not only to points upon which "'the court was actually required by the parties to form an "'opinion and pronounce a judgment, but to every point which "'properly belonged to the subject of litigation, and which the "'parties, exercising reasonable diligence, might have brought "'forward at the time'." Lord Shaw went on to add that *Henderson* v. *Henderson* [16] had frequently been referred to and followed, and was settled law. On the principles there stated it is contended on behalf of the husband that these allegations in paragraphs 9, 12 and 13 of the present petition, although not raised in the previous petition, nevertheless ought not to be allowed to be raised now.

On behalf of the wife it was contended in the first place that in relation to questions of estoppel the principles applied in this court differ materially from those applied in the ordinary civil courts. They differ, it is said, because of the overriding interest which the public has in proceedings in this court, particularly in those which raise questions of status. No one will desire to quarrel with the statement that this court is concerned, as no ordinary civil court is, with the public interest. It is argued that for that reason the ordinary rules of estoppel per rem judicatam do not apply here.

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[13] [1926] A.C. 155; 42 T.L.R. 207.

[14] [1926] A.C. 155, 170.

[15] (1843) 3 Hare 100, 114, 115.

[16] Ibid.

In support of that contention I was referred to some remarks of Langton J. in *Winter* v. *Winter*,[17] in which an application for rehearing was made by a respondent husband, who had allowed an undefended petition by his wife to go through and then had changed his mind about it. Langton J., sitting in the Divisional Court, made it clear that so far as the respondent personally was concerned he had no merits whatsoever. The Divisional Court nevertheless made an order for a rehearing of the case, largely because they held that they were not concerned only with the interests of the unmeritorious respondent, but with the public interest of ensuring that the respondent's case was properly investigated, and that the petitioner, merely because of the absence of the respondent, did not obtain relief to which she was not properly entitled.

Somewhat nearer to the circumstances of the present case was *Hudson* v. *Hudson*,[18] in which the question was raised whether a husband, against whom a justices' order had been made on the ground of persistent cruelty, was estopped by that order from contesting the same allegations of cruelty when brought in this court in the course of a petition for divorce. It was held that there was no estoppel, notwithstanding the fact that the justices' order had been the subject of an unsuccessful appeal to the Divisional Court who had expressly affirmed it. The decision, I think, is conveniently summed up by the second sentence of the headnote, in which it says [19]: "In the Divorce Court the matter is "not concluded per rem judicatam; and no doctrine of estoppel "can operate against a party so as to abrogate the statutory duty "of the court to inquire into the truth of a petition which is "properly before it." From that it is argued that the public interest prevents me from striking out, on the ground of estoppel, these paragraphs of the petition which are now objected to.

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[17] [1942] P. 151; 58 T.L.R. 365; [1942] 2 All E.R. 390.

[18] [1948] P. 292; 64 T.L.R. 258; [1948] 1 All E.R. 773.

[19] [1948] P. 292, 293.

I think that that argument rests on a misapprehension and on a failure to distinguish between an estoppel as against a party charged with an offence and an estoppel as against a party putting forward a charge against the opposite party. It is one thing to say that the respondent is not estopped from denying charges made by the petitioner; that is to say, that the petitioner cannot in this court get relief simply because the respondent is estopped from denying the charges. In that case, the public interest no doubt does intervene to see that relief is not improperly obtained by a petitioner merely through some technical rule. But it is quite another thing to say that a petitioner, who is the party bringing the charges, is entitled to persist in repeating allegations which have already been the subject of previous proceedings, and which have already been determined against him or her, merely to obtain relief for himself or herself. In such circumstances, as I see it, no interest of the public is infringed by saying that the petitioner is estopped per rem judicatam from repeating allegations which have previously been the subject of judicial determination. On the contrary, there is abundant authority for the proposition that in such cases the doctrine of estoppel applies with its full force in this court as in any other court. I do not propose to refer in detail to the wealth of authority on this subject; most of the cases are collected in Rayden on Divorce (6th ed., p. 185). At p. 184 the law is stated, so far as I can see, in an unexceptionable way: "Charges which have been unsuccessfully put forward "and disposed of in one suit, cannot be repeated in a second "between the same parties; for not only does the common law "doctrine of estoppel apply, but, since in matrimonial causes a "wife usually brings her suit at the expense of her husband, a "repetition of charges would act as a peculiar hardship. The rule "applies not only to the actual point of decision in the previous "case, but also to every point which properly belonged to the "subject of litigation, and which the parties, exercising reason-"able diligence, might have brought forward at the time." A good example of that is found in *Finney* v. *Finney*,[20] which has since been approved in *Harriman* v. *Harriman*,[21] and in *Winnan* v. *Winnan*.[22] In those circumstances I do not think that there is any merit in the first objection which the wife takes, and I hold that the ordinary rules as to estoppel per rem judicatam apply in relation to the allegations contained in this petition.

The next objection taken is that notwithstanding that the rules of estoppel may apply, nevertheless there is authority against holding that, where there has been a determination with regard to allegations of cruelty, the petitioner is necessarily estopped from raising the same allegations again in support of a plea of constructive desertion. On this aspect of the case it seems to me that the wife has a more formidable argument. I was referred in the first instance to the recent decision of Davies J. in *Dixon* v. *Dixon*,[23] which came before the judge in chambers on an application to strike out a plea of constructive desertion from a petition on the ground that the allegations put forward in support of it were the same allegations as had been the subject of an unsuccessful petition for cruelty. In other words, on the face of it, the problem before the judge in that case was precisely the same as the problem before me now. The difference was one to which I have already referred, in that there the judge was dealing with the application at the proper time, namely, on a summons in chambers before the trial came on, whereas I am asked to deal with it at the time of the trial. The summons was adjourned into court, and we therefore have the benefit of a report of the judgment. Davies J. felt himself unable to accede to the application, and consequently refused to strike out the offending paragraphs. I was invited by the wife to follow that decision, but it seems to me that the circumstances in *Dixon* v. *Dixon* [23] are distinguishable in material particulars from those of the present case. One of the difficulties which Davies J. appears to have felt, and to which he gave expression in the course of his judgment, was that of reconciling what was said in *Pike* v. *Pike*,[24] in the passages to which I have already referred, with the decision (also of the Court of Appeal) in *Edwards* v. *Edwards*.[25] The other circumstance which caused difficulty, and which I think was one of the main reasons for his decision, was the fact that in that case the judgment of the commissioner who had tried the original petition for cruelty was extremely brief; it did not deal in detail with all the various allegations put forward, and did not in the least make it clear what exactly the commissioner was deciding with regard to the various allegations. In those circumstances Davies J., although having a certain amount of sympathy for the application, held that it was impossible to take the drastic course of striking out the allegations in limine, but that the case must be allowed to go to trial.

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[20] (1868) L.R. 1 P. & M. 483.

[21] [1909] P. 123; 25 T.L.R. 291.

[22] [1949] P. 174; 65 T.L.R. 22; [1948] 2 All E.R. 862.

The present case is somewhat different. For here the judgment of the commissioner in the previous petition for cruelty is very full, dealing in detail with the various allegations which were raised. In particular, the judgment deals specifically with the allegations as to threats and assaults which are repeated in the present petition. So I do not share the difficulty, which Davies J. had, of not knowing what the commissioner in the previous proceedings really did decide in relation to the allegations now made.

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[23] [1953] P. 103.

[24] Ante, 81n.

[25] [1950] P. 8; 65 T.L.R. 419; [1949] 2 All E.R. 145.

Another matter in respect of which it seems to me that I have the advantage of Davies J. is that the difficulty of understanding what was meant by the Court of Appeal in *Pike* v. *Pike* [26] does not now persist; for since the decision of Davies J. *Timmins* v. *Timmins*,[27] to which I have already referred, has been before the Court of Appeal, and I have had the benefit of the explanation given in that case of what had previously been said in *Pike* v. *Pike*.[28] It may very well be that if Davies J. had had the advantage of reading what was said in *Timmins* v. *Timmins* [29] he might have come to a different conclusion. But at any rate, in view of what was there said in the passage to which I have already referred, it appears to me that in relation to these allegations of violence or threats of violence the principle applies that either they were acts of cruelty or, if they were not acts of cruelty, they were not "grave and weighty" matters at all. They cannot be put forward as "grave and weighty" matters other than cruelty on the ground, for instance, that they were not calculated to injure health, or did not involve any intent to injure. By their very nature they either come within the class of acts calculated to injure health or intended to injure health, or else they do not amount to anything at all; and if they do not amount to anything at all (which, as I see it, is the effect of the judgment of the commissioner) then they cannot be relied on as "grave and weighty" matters to support a charge of constructive desertion. At any rate, having the advantage of the decision in *Timmins* v. *Timmins*,[29] and bearing in mind the great difference between the judgment which is said to raise the estoppel in this case and that which was before Davies J. in *Dixon* v. *Dixon*,[30] I do not think that I can hold myself bound by the decision of Davies J. in that case.

Another authority strongly relied on on behalf of the wife was the case in the Divisional Court of *Foster* v. *Foster*,[31] in which there had been two summonses before different benches of justices. The first summons was on the ground of persistent cruelty, which the justices dismissed. The second summons, which came before a different bench, was on the ground of constructive desertion arising partly out of the same circumstances as the previous summons for cruelty, and in that second case the justices found in favour of the applicant. The question was then taken to the Divisional Court on appeal from the decision of the second bench of justices. The Divisional Court thus had to deal with a case where allegations, which had been the subject of a previous summons for cruelty, were again used to support a summons based on constructive desertion. It was a case about which the Divisional Court clearly felt a good deal of difficulty, and it appears to have occupied their attention for three days. Eventually the court came to the conclusion that they could not interfere with the decision of the second bench of justices. There was in that case, in addition to the matters put forward as allegations of cruelty in the earlier case, evidence of certain other acts said to have been done by the respondent husband subsequent to the date of the acts relied on in the first proceedings. The problem before the Divisional Court was not, of course, the same as that with which I have to deal here, namely, whether a party is to be allowed to make the allegations at all; there the allegations had already been made, and evidence given in support of them in the course of the proceedings before the justices. The problem before the Divisional Court was whether there was admissible evidence by which the decision of the justices appealed from could be supported. Their decision was that there was just enough evidence. It is clear that in coming to that decision the President and Collingwood J. were largely impressed by the fact that, in addition to the allegations which had been the subject of the previous proceedings for cruelty, there were other allegations of subsequent behaviour on the part of the husband which were capable of supporting a charge of constructive desertion. If that is right, then clearly *Foster* v. *Foster*[31] is distinguishable from the present case, quite apart, of course, from the obvious distinction to which I have already referred, namely, that the problem to be solved by the Divisional Court was not in the least the same problem as that which I have to consider here.

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[26] Ante, 81n.
[27] [1953] 1 W.L.R. 757.
[28] Ante, 81n.
[29] [1953] 1 W.L.R. 757.
[30] [1953] P. 103.
[31] Ante, 67; [1953] 2 All E.R. 518.

In the result, I hold that so far as this petition raises the same allegations as those put forward in the previous petition for cruelty the wife is estopped from reiterating those allegations in support of her plea of constructive desertion. That decision governs paragraphs 14, 15 and 17, which, as I pointed out, are paragraphs reiterating matters which formed the subject of specific allegations and specific findings in the previous case. With regard to paragraphs 9, 12 and 13, which raise matters not specifically raised in the previous proceedings, it is clear to me that these allegations could all well have been made as part of the cruelty case which it was then sought to establish; indeed, one could go further, and say from experience of this court that each of them is of the type commonly raised in almost every cruelty case which comes before this court. In those circumstances it appears to me that every word that was said in *Hoystead* v. *Commissioner of Taxation*,[32] in the passage to which I have already referred, applies with its full force. In my judgment the wife ought not now to be allowed to raise these allegations, which could well have been raised as part of her case of cruelty if they are allegations of substance.

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[31] Ante, 67; [1953] 2 All E.R. 518.

With regard to paragraphs 10 and 11 of the petition, the commissioner found that the association between the husband and his half-sister was not an adulterous association; indeed, in the discussion which followed the conclusion of his judgment he said: "I do not think that these charges of incestuous adultery should "ever have been brought. I think that they are wicked." Having regard to that finding, it is no longer open in law for the wife to allege that she has reasonable cause to suspect the husband's association with the woman named. That is the result of *Allen* v. *Allen*,[33] to which I have already referred. At no time, therefore, subsequent to January, 1952, when the commissioner pronounced his judgment, was that suspicion a matter which the wife could rely on in support of her plea of constructive desertion. The importance of this is that this petition was not presented until October, 1952, and the desertion complained of in a petition for divorce must cover the three years immediately preceding the presentation of the petition. Having regard to the decision of the commissioner in January, 1952, it appears to me that from that time onwards it was impossible for the wife to rely, in support of her allegation of constructive desertion, on the suspicion which she says that she had about her husband's relationship with the woman named. In those circumstances I do not think that it is open to the wife now to complain, as part of her case of constructive desertion, that she suspected that association.

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[32] [1926] A.C. 155.

[33] [1950] 1 All E.R. 724.

Paragraph 8 is the subject of the application for amendment to which I have already referred, and I venture to suggest to counsel for the wife that maybe paragraph 16 requires some amendment as well. That, however, is for him to consider and make such application as he thinks fit. But as I said at the outset of this judgment, I cannot see that the wife is in any way estopped, by reason of any finding in the previous proceedings, from alleging that the husband left her in April, 1930. No such allegation was put forward as part of the charge of cruelty which was investigated in the previous proceedings; nor, so far as I know, is it in any way connected with the charge of adultery which was then made. I say that, notwithstanding the fact that in paragraph 16 the name of the woman named is actually referred to; but it is not referred to in connexion with any charge of, or suspicion of, adultery. I can see no ground, therefore, on which I can fairly say that paragraph 16 ought to be struck out. If that paragraph is to stay in, then it seems to me that in order that the pleadings in the case should bear some relation to that which it is desired to prove by evidence, I ought to allow the amendment sought for the purpose of alleging simple desertion in April, 1930.

That is my judgment on the matter submitted to me, and I venture to suggest that counsel may now direct their minds to the proper course to take. It may be that both sides will desire to consider the position. I do not know whether the wife will desire to persist in her allegation and go on with the petition. It is a matter for her decision.

I have not said a word so far on the subject of delay, but I cannot help adverting to the fact that the act of desertion which it is now desired to allege is said to have happened 23 years ago, and this is not exactly the first opportunity which the wife has had of bringing it forward. It is true that she could not proceed in this country until 1949; but unless I am told that I am wrong I should assume that she could have proceeded a good deal before that in her own country. In those circumstances it is obvious that the question of delay must arise. I have not dealt with that question in what I have said so far, because it seems to me that it comes properly at a later stage of the case; it is one of the things about which the wife will clearly have to be questioned if the case goes on and she has to give her evidence, and in the end it may be that I shall have to consider whether the delay has been such that in my discretion I ought to refuse relief. But I think that any consideration of that properly comes later, and that is why I have purposely refrained from dealing with it in the points which I have considered so far. I mention it now so that counsel may have it in their minds when taking stock of their position and considering what is to be done.

The wife's case of simple desertion was then heard, and on July 31, 1953, her petition was dismissed after Simon Q.C. had elected to stand on his submission that there was no case to answer. His Lordship held that the wife had failed to satisfy him: (1) that the separation of which she complained had been brought about by the act of the husband in leaving her; (2) that the husband in leaving her did so with the intention of bringing cohabitation to an end; (3) that during the relevant period the husband had at all material times remained of the same intent; (4) that the husband's separation throughout the statutory period was without reasonable cause; and (5) that the separation was without her own consent.

Dealing with the question of delay his Lordship said: Prima facie there has been a very considerable delay in bringing this complaint on the part of the wife before the court, and it is, of course, the duty of the court under section 4 of the Matrimonial Causes Act, 1950, to inquire into that matter and to exercise its discretionary powers if satisfied that the petitioner has been guilty of unreasonable delay in presenting or prosecuting the petition. The time of delay before this petition was launched is some 22 years. But to state it like that, of course, is not fair to the petitioner. She could not launch any petition in this country until the end of 1949. What the state of affairs in Sierra Leone is I have not been fully informed. But in the absence of evidence to the contrary I feel disposed to assume that the law of that colony follows the law of the home country. In that case it would presumably have become possible for the wife to launch a petition for desertion at any time after January 1, 1938. She could even before that have proceeded for a dissolution over there upon proof of desertion coupled with adultery. I merely mention that to show that, if it were ever a true and bona fide case, opportunity existed of proceeding with it at a much earlier date than the time when the petitioner came to England. The allegation could, as I see it, have been made in West Africa.

But assume that I am wrong about that. Assume that the wife could do nothing at all till after she came to England and until after Parliament had passed the Act of 1949. Bearing in mind the extreme antiquity of the desertion which the wife now desires to allege, it was most desirable, as soon as the opportunity

1953

BRIGHT
v.
BRIGHT.

Willmer J.

occurred, to make the allegation forthwith. Instead of that the wife wasted valuable months, even years, by putting on the file a petition for cruelty and adultery which, as we know, failed. Even when she put this petition on the file she did not allege that which has been the subject of the case now actually put before this court. It was not until the day before yesterday that for the first time she alleged that which I have been trying. It is the fact that, apart from the delay, the wife has changed her case and has wasted time in fruitless litigation over the previous petition which, incidentally, is quite inconsistent with the case which she is trying to set up in this petition. This compels me to the conclusion that upon any view the wife's delay in setting up this case was an unreasonable delay, and, if I thought that she had made out any case of desertion against this husband, I am bound to say that I should have hesitated long before exercising my discretion in her favour. That point, however, in view of my conclusion on the main part of the case, does not arise for determination. For the reasons which I have given, in my judgment this petition must be dismissed.

Estoppel found save as to allegation of simple desertion.
Petition dismissed.

Solicitors: *Sidney Franks; How, Davy & Lewis.*

J. B. G.

HILL v. HILL.

1954
Jan. 21, 22.

Davies J.

Husband and Wife—Divorce—Estoppel—Res judicata—Previous cruelty petition dismissed—Charges held trivial—Similar allegations raised as defence to petition for desertion.
Estoppel—Per rem judicatam.

A wife who had left her husband petitioned for divorce on the ground of alleged cruelty, and her petition was dismissed, the trial judge holding that, although there had been injury to health, if and in so far as she had proved anything against her husband, the incidents were extremely trivial, and she had entirely failed to make out any matrimonial misconduct of any sort or kind.

The husband later filed a petition for divorce on the ground of alleged desertion, relying upon the fact that the wife had left

1954

Hill
v.
Hill.

the home with the children and had ever since lived separate and apart. The wife by her answer alleged inter alia that she had had just cause for leaving and not returning to the husband, and further that she had been constructively deserted; and she relied upon allegations of misconduct which were substantially the same as those formerly relied upon in support of the charge of cruelty. The husband by his reply pleaded that the wife was estopped from raising those charges in these proceedings:—

Held, that the wife was not only not entitled to rely in support of a plea of constructive desertion upon the acts which she had previously unsuccessfully alleged (a point which was conceded on her behalf), but that the same principle of estoppel applied in view of the nature of the previous finding to her attempt to rely upon them by way of just cause for leaving her husband.

Pike v. *Pike*, ante, 81n.; [1953] 1 All E.R. 232; *Dixon* v. *Dixon* [1953] P. 103; [1953] 1 All E.R. 910; *Timmins* v. *Timmins* [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187 and *Bright* v. *Bright*, ante, 270; [1953] 2 All E.R. 939 considered.

Defended petition for divorce.

The husband by his petition alleged that he had been deserted by his wife when she left him on May 7, 1949. The wife by her answer denied desertion and alleged that she had had just cause for leaving him by reason of his behaviour and unkindness. In August, 1949, the wife had presented a petition for divorce upon the ground of alleged cruelty; but her petition had been dismissed by Pilcher J. on March 7, 1950. In her answer in these proceedings, however, the wife relied upon allegations which were substantially the same as those previously made in support of her allegation of cruelty.

The husband by his reply alleged: "That the respondent is "estopped from alleging the matters set out in paragraphs 2 (*b*) "and (3) of the said answer and the particulars thereto by reason "of the following matters: (*a*) On August 19, 1949, the respon- "dent presented a petition in this Honourable Court for "dissolution of marriage on the ground of the petitioner's alleged "cruelty. (*b*) The said petition was heard and determined in this "Honourable Court by Pilcher J. and was dismissed by him on "March 7, 1950. (*c*) No appeal has been entered or prosecuted "against the said order dated March 7, 1950, and the same is a "valid and subsisting order. (*d*) The allegations contained in "paragraphs 2 (*b*) and (3) of the said answer herein and the "particulars thereto are the same or substantially the same as "those which were alleged or which could have been alleged in "the said petition dated August 19, 1949."

No objection was taken on the ground of estoppel to an allegation by the wife in her answer that she had left home at the suggestion of the husband. A prayer in the answer in these proceedings for a divorce upon the ground of constructive desertion founded on the same allegations as those put forward as just cause for leaving was not pursued.

The court heard argument upon the question of estoppel, and ruled in favour of the petitioner upon that point, before evidence was called; but judgment was given after the conclusion of the evidence.

Pilcher J. in his judgment said: " . . . Family life was " extremely uncomfortable, so that she, the wife, I think on May " 7, 1949, in pursuance of a decision which she arrived at some- " what earlier, left the house with the children and has never been " back to live with her husband since. . . . Now, I have heard " the evidence of the wife and of the husband very fully and one " cannot help feeling considerable sympathy, I think, for both " parties in this case. But as a cruelty case it is quite hopeless, " it does not begin to get near a cruelty case. I felt considerable " doubt as to whether I ought not to stop the case after the " petitioner's evidence was completed, but I thought, in all the " circumstances, that it might be more satisfactory to hear the " husband's evidence, and having heard his evidence I am con- " firmed in the view which I held at the conclusion of the " petitioner's case." Pilcher J. then said that he had no doubt that both parties had been unhappy, and that the wife had had colitis; and continued: " . . . I have not the slightest doubt that " the unhappy atmosphere which clearly existed in this household " during the last two or three years has had its reaction upon the " wife, and I am quite prepared to believe that now she has left " her husband she feels better. And if I had come to the con- " clusion that the husband had been guilty of matrimonial " misconduct which entitled me to grant the wife relief provided " I was satisfied that she had suffered in her health, I should " upon the evidence, I think, have had little difficulty in con- " cluding that her state of illness had been contributed to by " the matrimonial misconduct of her husband; but even though " her health may be affected, that will not enable me to grant " her any relief by way of dissolution unless I am also satisfied " that her husband has been guilty of conduct which can be called " cruel in this court. When I say ' conduct,' that means ' mis- " ' conduct '; that is to say, that he has behaved in a fashion in " which he ought not to have behaved and has been guilty of " matrimonial misconduct. It is not necessary that he should

1954

HILL
v.
HILL.

"have acted maliciously or with the deliberate intention of "injuring his wife's health, provided that the way he has behaved "can properly be qualified as matrimonial misconduct."

After referring to the temperaments of the two parties, Pilcher J. said: "Now I am not going through the history of this "case and the complaints made by the wife as outlined in the "petition. They are there for anyone who is interested in the case "to read. A mere perusal of them indicates that the incidents "in themselves are extremely trivial. I pay little if any attention "to the alleged physical assaults. I think if the wife did make "any such observation as is attributed to her by the husband in "connexion with his Christianity he cannot really complain. "Particularly, she knew that they were not getting on very well "at that moment. I do not think he slapped her more than once. "If her wrist was twisted, I do not think that her husband twisted "her wrist to hurt her; I think that he probably did it in order to "obtain possession of the school report which she had got in her "hand. On the other occasion, I prefer the husband's account to "the wife's. I think that he did push her into another room and "there held her a prisoner in that room for some time until she "consented to apologise. I gather that she did apologise, and "that shortly afterwards he let her out. There is nothing in "that."

Pilcher J. then pointed out that the real trouble in this marriage was disagreement about the daughter Margaret, and said: ". . . Obviously it is a situation for which it would be "difficult to blame the wife for taking the children away, because "I am quite satisfied that the husband and wife took different "views with regard to the discipline to which they ought to be "subjected; and if the wife sided openly with them the sooner "the situation was resolved by a parting the better. So that "whilst I do not blame Mrs. Hill for arriving at the conclusion "that she and her children and her husband could no longer "continue to reside under the same roof, I think that she was "in quite a large measure the author of her own undoing." Pilcher J. concluded by saying: "It is unnecessary I should say "any more because I think that the case is a perfectly straight-"forward one. I think that the wife fails, and fails hopelessly, "to make out the case which she has set out to do, and the "petition will therefore be dismissed."

John B. Latey for the husband. In the previous proceedings Pilcher J. held that of the matters alleged some never took place and the remainder were shown upon the evidence to have been extremely trivial. Although it is conceded that there may be cases where allegations of cruelty in previous proceedings have been dismissed because they did not amount to cruelty, as where no injury to health or intent was proved, but might have amounted to just cause for leaving (see *Timmins* v. *Timmins* [1]) and as such be available as a defence in future desertion proceedings, in the present case there has been no previous finding of conduct which while less than cruelty might have been grave and weighty. [He referred to *Pike* v. *Pike*.[2]]

Although in *Dixon* v. *Dixon* [3] the court refused to take the drastic step of striking out the pleading in limine, the previous judgment had been extremely short, and it was impossible upon that judgment to hold that there could be no evidence of grave conduct which might amount to a good defence to a charge of desertion. *Harriman* v. *Harriman* [4] and *Hudson* v. *Hudson* [5] did not decide that there was no estoppel inter partes but that no such estoppel could operate so as to abrogate the statutory duty of the court to inquire into the truth of a petition which was properly before it. If there were any circumstances indicating that the court might be assisted in its duty of inquiry by ignoring the estoppel the court could and should do so. *Bright* v. *Bright* [6] was no authority to the contrary, since Willmer J. said that the public interest no doubt did intervene to see that relief was not "improperly" obtained by a petitioner merely through some technical rule. In this case there is no suggestion that any such circumstances exist; the issues do not vary in any material respect from those which were before Pilcher J., and his clear and express judgment does not permit of the argument that the charges, while not amounting to cruelty, amounted to something grave and weighty constituting just cause for living apart or constructive desertion.

C. A. Marshall-Reynolds for the wife. Although the cross-allegation of desertion cannot be pursued, the defence of just cause for leaving remains open, for there is a distinction "between an "estoppel as against a party charged with an offence and an "estoppel as against a party putting forward a charge against the

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[1] [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187.

[2] Ante, 81n.; [1953] 1 All E.R. 232.

[3] [1953] P. 103; [1953] 1 All E.R 910.

[4] [1909] P. 123.

[5] [1948] P. 292; 64 T.L.R. 258; [1948] 1 All E.R. 773.

[6] Ante, 270.

"opposite party": *Bright* v. *Bright.*[7] In that case the same person had prayed for relief in both suits.

[DAVIES J. Is not the wife, however, merely seeking to re-litigate in this case matter previously decided against her?]

There had been no question in the previous case of a defence to a charge of desertion, for the husband could not raise the issue as three years had not elapsed since the separation: it was not a case where the question of just cause for leaving might have been raised in a reply.

There may be just cause for leaving although the conduct did not amount to cruelty: *Russell* v. *Russell*[8]; *Timmins* v. *Timmins.*[9]

DAVIES J. The case of desertion as pleaded in the husband's petition is a simple and straightforward one. He alleges, as is the fact, that in May, 1949, his wife left him and left the matrimonial home, taking with her the children, a boy born in July, 1931, and a daughter born in June, 1934, and has ever since lived separate and apart from him. The wife by her answer denies the desertion, and in paragraph 2 she pleads that she admits that she left the matrimonial home on May 7, 1949, but alleges (*a*) that she did so at the suggestion of the petitioner, and (*b*) that she had just cause for leaving the matrimonial home and for not returning to the petitioner. Under (*a*), to which I will revert later on, there are certain particulars set out of the allegation that she left at the suggestion of the petitioner. But the important matter which I am going to consider in the first place is (*b*). Under (*b*) there are particulars numbered (1) to (14) of the allegation of just cause: "that the petitioner by his unkindness and "behaviour drove the respondent from the matrimonial home." In addition to that defence in paragraph 2, the answer goes on in paragraph 3 to allege constructive desertion by the husband of the wife from the same date, namely, May 7, 1949, and the particulars of that allegation are in terms a repetition of the particulars given in paragraph 2 (*b*) of the answer.

It has often been said that estoppel is a matter that must be fully and properly pleaded, and I am bound to say that the reply in my judgment is an admirable example of the way in which estoppel ought to be pleaded. [His Lordship read the relevant paragraph of the reply and continued:] That, therefore, brings us at once to consider the first problem which arises in this case, as to the validity or otherwise of the plea of estoppel. For convenience, counsel agreed that just as, I think, was done in the recent case of *Bright* v. *Bright*,[1] the plea of estoppel should be argued first before the evidence was heard; because obviously if I were to decide against the wife on this point, a great deal of time and money would have been wasted if I were to hear all the evidence first and rule on the point of law afterwards.

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[7] Ante, 270.

[8] [1897] A.C. 395.

[9] [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187.

There is no doubt at all (indeed Mr. Marshall-Reynolds for the wife does not contend otherwise) that with the exception of two or three very minor and unimportant matters every single allegation that is made in this answer was contained in the wife's former petition for dissolution on the ground of cruelty. Mr. Latey in his opening gave me a comparative table of the pleadings which it is not necessary for me to go into because it is not disputed that the allegations are substantially the same. There were one or two small matters which were not pleaded in the former petition, but it is clear that they could have been, and therefore the principle of estoppel applies just as much to them as it does to the matters which were expressly raised, in accordance with the well-known rule which is set out in the opinion of the Judicial Committee in *Hoystead* v. *Commissioner of Taxation.*[2]

Mr. Marshall-Reynolds admitted at the outset that on the present state of the authorities he could not pursue his cross-allegation of constructive desertion. But he was not prepared to assent to the proposition that the defence of just cause to the charge of desertion fell together with the cross-charge of constructive desertion. It was, therefore, necessary to look at certain authorities, and in particular at four recent cases, none of which had been reported before the date of the answer in the present case, which was December 31, 1952. Those cases are *Pike* v. *Pike* [3]; *Dixon* v. *Dixon* [4]; *Timmins* v. *Timmins* [5]; and *Bright* v. *Bright* [6]; but before considering the authorities it is obviously necessary that I should look at the judgment of Pilcher J.,[7] who tried the wife's petition, to see exactly what it was that he decided. That petition was a straightforward petition on the ground of cruelty, and the answer was a straightforward denial. I do not propose to read the whole of the judgment, but there are certain passages which I think are important. [His Lordship then read the relevant parts of the judgment of Pilcher J. as set out above, and said that Pilcher J.'s observation that the incidents in themselves were extremely trivial was indeed important. His Lordship continued:] It appears, therefore, that Pilcher J. is there saying: "I think that this woman's health was affected, but it was not "due to any matrimonial misconduct on the part of the husband: "the acts alleged by the wife are either not proved or" (to use the judge's own words) "were extremely trivial." The question which I have to decide is whether or not, when Pilcher J. came to that conclusion on the allegations made by the wife in the former petition, Mrs. Hill is entitled, having had those charges adjudicated upon and dismissed when she was using them to attack her husband in order to obtain a decree from him, to reopen them now and to re-litigate those same matters all over again by way of a buckler or shield against her husband's charge of desertion, and to allege that she had by reason thereof just cause for leaving her husband.

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[1] Ante, 270; [1953] 2 All E.R. 939.

[2] [1926] A.C. 155, 170; 42 T.L.R. 207.

[3] Ante, 81n.; [1953] 1 All E.R. 232.

[4] [1953] P. 103; [1953] 1 All E.R. 910.

[5] [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187.

[6] Ante, 270.

[7] Unreported.

This point has been fully argued. There are matters of difficulty in this branch of the law, and I cannot help expressing the opinion that it would be an advantage to the profession, and certainly to those who have to apply the law, if the highest court were to determine this matter one day. But I must apply the law as it is, according to my understanding of it.

I do not need to refer to *Pike* v. *Pike*,[8] and I am not going to refer to *Dixon* v. *Dixon*,[9] which was a decision of my own where a precisely similar problem arose, not at the hearing but on an application to strike out certain paragraphs of the pleading, save to say that I do not feel the difficulty in this case that I felt in *Dixon* v. *Dixon*.[9] The difficulty there was that the commissioner who had adjudicated upon the matter previously clearly indicated that the charges had not been made out; but it was somewhat difficult to know precisely on what grounds he had based his reason. In the present case, however, as is plain from the excerpts which I read from Pilcher J.'s judgment, there is no such difficulty.

I think that it is not really necessary for me to go much further back than the recent decision of the Court of Appeal in *Timmins* v. *Timmins*.[10] The facts in that case, so far as they are material, were that the husband filed a petition for restitution of conjugal rights, and the wife set up that she had good cause for leaving

[8] Ante, 81n.

[9] [1953] P. 103.

[10] [1953] 1 W.L.R. 757.

1954

HILL
v.
HILL.

Davies J.

her husband. Wallington J. found that the wife had not established that her husband's conduct amounted to cruelty; although the husband was domineering, the judge was not satisfied that the wife's breakdown was due to any wrongful conduct on the part of the husband, and the wife had not made out just cause for leaving him. Although the judge was somewhat anxious about whether he ought to do so, he granted a decree of restitution. Against that order the wife appealed, and the majority of the Court of Appeal, consisting of Denning and Hodson L.JJ. and Lloyd-Jacob J., held that in the special circumstances of that case it was wrong to make a decree of restitution, although Hodson L.J., who has been a party to many of the decisions on this branch of the law, dissented in that regard.

An important passage in the judgment of Denning L.J. is this [11]: "We were referred to *Pike* v. *Pike*,[12] and, in view of "some comments made on it by Davies J. in *Dixon* v. *Dixon*,[13] "I think that I ought to explain some of the things which I there "said. In considering whether one party has good cause for "leaving the other, much depends on whether the conduct "complained of is of a 'grave and weighty' character or not. "Conduct which is of a grave and weighty character may "sometimes fall short of cruelty because it lacks the element of "injury to health (as in *Russell* v. *Russell* [14] and *Edwards* v. "*Edwards* [15]), or because it lacks the element of intent to injure "(as in the case of drunkenness or association with other women); "but nevertheless it may give good cause for leaving, as the cases "which I have cited earlier amply show." It is interesting to note that of the cases to which Denning L.J. referred, all with one exception—the somewhat odd case of *Butland* v. *Butland* [16]—concerned acts not of violence but acts, to use the phrase used by the Lord Justice in another well-known case, that could not really be said to be aimed at the other party. Denning L.J. continued: "On the other hand, conduct which is not 'of a grave "'and weighty character,' and is for that reason not cruelty, "does not give good cause for leaving: see *Yeatman* v. *Yeatman*.[17] It is conduct of that kind to which I referred in *Pike* "v. *Pike* [18] when I said that conduct 'less than cruelty' does "not justify a spouse in leaving."

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[11] [1953] 1 W.L.R. 761.
[12] Ante, 81n.
[13] [1953] P. 103.
[14] [1897] A.C. 395; 13 T.L.R. 516.
[15] [1950] P. 8; 65 T.L.R. 419; [1949] 2 All E.R. 145.
[16] (1913) 29 T.L.R. 729.
[17] (1868) L.R. 1 P. & D. 489.
[18] Ante, 81n.

Now, I apply those words to this case. Pilcher J. did not dismiss the petition on the ground that there was no evidence of injury to health; he thought that there was injury to health, and said in terms that if he had been satisfied that there was matrimonial misconduct he would have been prepared to say that such injury was occasioned by the husband's conduct. The ground upon which he dismissed the petition was that if and in so far as the wife proved anything against the husband, the incidents were extremely trivial and that she had entirely failed to make out any matrimonial misconduct of any sort or kind.

That being so, it seems to me quite impossible to say that the matters alleged by the wife not " were " but " could be " of such a grave and weighty character that even though they had been held not to amount to cruelty they could again be re-litigated and relied upon as constituting just cause for the wife to leave her husband. That really is sufficient to dispose of this case.

Willmer J.'s decision in *Bright* v. *Bright* [19] is the most recent decision on this point. He referred to *Timmins* v. *Timmins*,[20] which I have already cited, and he also considered the point, which I do not think it necessary for me to deal with in this case and which was covered by Lord Merriman P.'s judgment in *Hudson* v. *Hudson*,[21] namely, whether an estoppel can arise so as to bar this court, or estop the court from making the inquiries which are incumbent upon it by statute. It was argued before Willmer J. that on the ground of public policy and the statutory duty of this court to inquire into the facts in the interests of the State in matrimonial disputes it would be wrong to strike out the allegations with which he was there dealing on the ground that the party was estopped from raising them. Willmer J. said [22]: " I think that that argument rests on a misapprehension and on " a failure to distinguish between an estoppel as against a party " charged with an offence and an estoppel as against a party " putting forward a charge against the opposite party. It is one " thing to say that the respondent is not estopped from denying " charges made by the petitioner; that is to say, that the petitioner cannot in this court get relief simply because the " respondent is estopped from denying the charges. In that case, " the public interest no doubt does intervene to see that relief is " not improperly obtained by a petitioner merely through some " technical rule. But it is quite another thing to say that a " petitioner who is the party bringing the charges is entitled to

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[19] Ante, 270.
[20] [1953] 1 W.L.R. 757.
[21] [1948] P. 292.
[22] Ante, 284.

"persist in repeating allegations which have already been the "subject of previous proceedings, and which have already been "determined against him or her, merely to obtain relief for "himself or herself."

Mr. Marshall-Reynolds has, if he will permit me to say so, with some ingenuity pressed me with that passage, and argued that the present case really is decided in his favour by it. Willmer J., he says, was there concerned with the case of a petitioner seeking to re-allege charges which had been disposed of, whereas here we have a respondent who is seeking to re-litigate as a matter of defence matters which have been disposed of when they were put forward as the ground of a petition. It seems to me that that is a distinction without a difference.

There obviously might be cases—some of them were discussed in the course of the arguments—where, despite an estoppel against a party, the court would think it necessary to inquire. One of the examples mentioned during the argument was a case where there had been a finding of no adultery in a previous suit and the court had reason to believe that, although the party was estopped from raising the point again, there were grounds for suspecting that adultery had in fact been committed: in such a case the Queen's Proctor could no doubt be asked to assist the court. But apart from cases of that kind it seems to me that when, in a case such as this (and after all I am only concerned with this case and not laying down or attempting to lay down any general rule), a wife in her petition filed in the autumn of 1949 made various allegations, all of matters alleged to have occurred prior to the final break-up of the marriage in May, 1949, which fell to the ground as being unproved, it would, obviously, be as plain a breach of any known principle of estoppel, whether in this Division or any other, as it would be possible to conceive, to allow her in answer to her husband's petition on the ground of desertion filed after the statutory triennium had expired to raise those very same matters again which have been decided against her.

It was for those reasons that at the end of the argument and before the evidence was heard I ruled that just as the respondent through her counsel admitted that she was not entitled in support of a plea of constructive desertion to rely upon these acts which she had previously unsuccessfully alleged, so also the same principle applies to her attempt to rely upon them by way of just cause for leaving her husband. No evidence, therefore, has been called on that part of the case.

1954

HILL v. HILL.

Davies J.

[His Lordship then considered the evidence upon the wife's further allegation that she had left at the suggestion of the husband; and finding that there was no evidence whatever to support this allegation, concluded:] This case is as plain as anything can be. The wife for reasons which seemed good to her made up her mind to go and she did go, and nothing that her husband might say would stop her.

It may well be, as Pilcher J. having heard all the evidence was of the opinion, that it was best for both of them that they should part; but that does not alter the fact that in leaving she deserted him unless she could show—as for the reasons which I have already explained, she is not entitled to show on the same material—that her action in leaving him was justified. She entirely failed to convince Pilcher J. that the husband had been treating her with cruelty, and there is nothing in the present case which the wife sought to rely on save the same alleged conduct on the part of the husband. The most to which it could amount would be conduct of the same kind as cruelty but less than cruelty. That being so, there must be a decree nisi on the petition.

Decree nisi.

Solicitors: *Church, Adams, Tatham & Co. for Matthew Arnold & Baldwin, Watford; Henry B. Sissmore & Co.*

J. B. G.

1953
Oct. 13.

Lord Merriman P. and Pearce J.

PADLEY *v.* PADLEY.

Husband and Wife—Justices—Practice—Provision of reasons—Time for—Notice of appeal not filed—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940), *r.* 71 (3).

Justices should not wait until an appeal in a matrimonial matter is set down and effective before providing the appellant with the reasons for their decision, which must be filed under rule 71 (3) of the Matrimonial Causes Rules, 1950, with the notice of appeal. It is also desirable that a would-be litigant should not be compelled to incur the expense of starting an appeal before obtaining the notes of evidence and the reasons upon which the merits of a possible appeal can be considered.

APPEAL to Divisional Court from the justices for the City of Nottingham.

The merits of the appeal are immaterial to this report; but the justices had asked for guidance on the question whether they might wait for an appeal to be set down and become effective before stating their reasons for the decision against which the appeal was to be made.

R. L. Bayne-Powell for the appellant.
K. Bruce Campbell for the respondent.

LORD MERRIMAN P., after stating the nature of the appeal, continued:—I wish to say a few words on a purely technical matter, because the justices have expressed a hope that we would give them some guidance on the point. The appeal was some four or five weeks out of time, and part of that time was taken up by some delay in obtaining the reasons of the justices for their decision. This, I gather, was because, through their clerk, they expressed the view that they would prefer to wait for the appeal to be set down and become effective before they went to the trouble of stating their reasons. They wish to know whether that was correct or not.

I will answer that question in two ways. Looked at from a strictly technical point of view it was certainly wrong, because the rule [1] governing appeals from justices in these cases under the matrimonial code provides that at the time of setting down the appellant must file the notice of appeal, the notes of the evidence supplied by the justices, and the statement of their reasons. From this it follows, as a matter of course, that the rule cannot be complied with if justices withhold their reasons until the case is set down.

But apart from the question of a strict compliance with the rule, there is, in my opinion, a very good business reason for obtaining at the earliest possible moment from justices not only the notes of the evidence but also the reasons for their decision. It is a matter of common knowledge that some legal aid committees when asked to give a certificate to an appellant from a decision under the Summary Jurisdiction (Married Women) code prefer, in the first instance, to give a limited certificate to enable the appellant to take up the notes of evidence and the statement of reasons, so that the committee can then consider for themselves whether there is any likelihood of the appeal being successful. I am not laying down any rule that that ought to be done. Suffice it to say that many people take the view that it would be a good thing if that practice were more frequently followed; but, of course, it could not be followed at all if justices were to refuse to give their reasons until the appeal had become effective. Under the legal aid scheme no costs can be recovered which are incurred before the period covered by the certificate; and so it follows that if parties have to take up the notes and the statement of the justices' reasons at their own expense, it might conceivably result in a denial of justice.

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[1] Matrimonial Causes Rules, 1950, r. 71 (3): "The appeal shall be "entered by lodging at the Divorce "Registry two copies of the notice of "motion. There shall be lodged at "the same time two certified copies "of the summons and of the order "appealed against, two copies of the "justices' clerk's notes of the evidence "and two copies of the reasons of the "justices for their decision."

Having said this merely because we were told that the justices, or their clerk, desired an expression of our views about it, I wish to make it perfectly plain that there is not the slightest hint that the justices in this case were intending to be in the least obstructive. No complaint to that effect has been even suggested, and, indeed, it would be quite impossible to suggest that the reasons in this case were held back because the justices were unable to formulate the reasons for their decision. On the contrary, if there is one thing which is perfectly plain in this case, it is that the justices have provided themselves and us with an admirable note of the evidence, and a statement of their reasons which makes it abundantly clear that they took great pains about the case, and very fully appreciated what it was all about.

[His Lordship then considered the case upon the merits.]

PEARCE J. I agree with all that has been said. I sympathize with the reluctance of justices to provide their reasons and notes in cases where there is merely talk of an appeal and an appeal may never really result, especially since this case shows how much care and trouble they take over the provision of their reasons. But, as my Lord has pointed out, quite apart from the technical rule it really is not satisfactory to compel a would-be appellant to incur the expense of starting an appeal before he can obtain the notes and reasons, which alone will show him whether there is the faintest prospect of success. To do so would merely be to multiply the number of hopeless appeals, since one knows from experience that once an appeal is launched, even if it later appears to have little hope of success, it tends to go forward of its own momentum. As so many of the appeals in this court have

1953

PADLEY *v.* PADLEY.

legal aid that is a matter of which one must take particular note.

[His Lordship then considered the merits.]

Solicitors: *Gibson & Weldon for Crockford & Anderson, Nottingham; Sidney Elphick for Clayton, Ellis & Massey, Nottingham.*

J. B. G.

COTTON *v.* COTTON.

C. A.

1954 *Apr.* 8, 9.

Singleton, Jenkins and Hodson L.JJ.

Legitimacy—Presumption—Paternity issue—Wife's association with co-respondent—Subsequent birth of child—Husband and wife sleeping together—Whether presumption of legitimacy rebutted—Husband's evidence of no intercourse—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 32 (1).

Husband and Wife—Divorce—Paternity—Rebuttable presumption.

Since a husband or wife may now give evidence to prove that marital intercourse did or did not take place (section 32 (1) of the Matrimonial Causes Act, 1950), where a husband and wife are shown to be sleeping together, the inference is not irresistible that intercourse took place. When the legitimacy of a child is disputed on the ground that the husband was not the father, the question cannot be decided on a mere balance of possibilities. The evidence repelling the presumption of legitimacy must be strong, distinct, satisfactory and conclusive.

Observations of Luxmoore J. in *In re Bromage* [1935] Ch. 605; 51 T.L.R. 408 applied.

A husband was granted a decree of divorce on the ground of adultery by his wife with one Joffre H. in or about June, 1951, when she left her husband and went to live with the co-respondent. On December 22, 1951, she bore a child whom she named Joffena. The husband gave evidence, on a paternity issue, that he had not had sexual intercourse with the wife since January 29, 1951, but that they had slept in the same bed until they parted. The wife's evidence was rejected. The commissioner found that the child was legitimate. On appeal:—

Held, that, there being no error of law on his part, the appeal must be dismissed.

APPEAL from Judge Whitmee sitting as Special Commissioner at Ipswich.

The petitioner, Harold Edwin Cotton, was granted a decree of divorce on the ground of the adultery of his wife, Violet Elizabeth

C. A.
1954

COTTON
v.
COTTON.

Cotton, with the co-respondent, Joffre Howard. The wife left her husband in June, 1951, when she was three months pregnant, and she went straight to the house of the co-respondent, where she had continuously lived since she left her husband. He alleged that for some time before the wife left there had been trouble between them because of her association with the co-respondent, and that she had been carrying on an adulterous association with him. The husband presented his petition for divorce on December 11, 1951. On December 22, 1951, a child, Joffena Carol Cotton, was born to the wife. The husband contended that this child was not his child because during the relevant period he had not had intercourse with his wife. The commissioner directed that the question whether the child was the legitimate child of the marriage should be tried as a separate issue. The commissioner held that the child was legitimate.

The husband appealed. The facts are more fully stated in the judgment of Singleton L.J.

R. M. O. Havers for the husband. The commissioner misdirected himself. He proceeded on the assumption that where a husband and wife are sharing the same bed, the husband could not discharge the onus of proving that a child conceived during this period was not his child. The commissioner in fact accepted the statement of the law in Halsbury's Laws of England, 3rd ed., vol. 3, p. 90, where it is stated that where a husband and wife are sleeping together the evidence is irresistible that intercourse took place. That passage is based on the early authorities. Until 1950 a husband could not give evidence of non-access. Now, under section 32 (1) of the Matrimonial Causes Act, 1950, the evidence of a husband or wife is admissible to prove that marital intercourse did not take place. [Reference was made to *Morris* v. *Davies* [1]; *Russell* v. *Russell* [2]; *The Banbury Peerage Case* [3]; *Watson* v. *Watson* [4]; *In re Bromage* [5]; *In re Jenion* [6]; and Sir Harris Nicolas' Treatise on the Law of Adulterine Bastardy, p. 186.]

The commissioner misdirected himself in refusing to accept the husband's evidence that he had not had intercourse with his wife during the relevant period. If he had taken this evidence into due account the commissioner must have found that the co-respondent was the father of this child. The court should direct a retrial of this issue.

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[1] (1837) 5 Cl. & Fin. 163.

[2] [1924] A.C. 687; 40 T.L.R. 713.

[3] (1811) 1 Sim. & St. 153.

[4] Ante, 48; [1953] 2 All E.R. 1013.

[5] [1935] Ch. 605; 51 T.L.R. 408.

[6] [1952] Ch. 454.

F. P. Keysell for the wife was not called on.
J. T. Turner for the child.

Singleton L.J. This is an appeal from a decision of the late Judge Whitmee, sitting as Special Commissioner at Ipswich. There had been a petition in which Harold Edwin Cotton sought a decree of dissolution of marriage on the ground of his wife's adultery with a man named Joffre Howard. The petition was heard on May 5, 1952, and the husband was granted a decree nisi on the ground of that adultery. The adultery was alleged as being in or about June, 1951. The decree has been made absolute.

At the time when the husband and wife parted there were three children. Another child, Joffena Carol Cotton, was born after they had parted. The petition was amended accordingly, and that child is the subject-matter of these proceedings. On the hearing of the petition the question as to the paternity of that child was reserved, and it was not dealt with until January 7, 1954. The husband and wife were represented, and the infant child, Joffena Carol Cotton, was represented by counsel appearing on the instructions of the Official Solicitor as guardian ad litem. This was a question which affected the legitimacy of the child.

The commissioner, after hearing counsel, decided that the child was a legitimate child of the marriage. Against that order the husband appeals to this court.

The husband and wife parted for a short time in May, 1951. The wife then went to the house of a Mrs. Shaw. They parted again in June. There is no doubt from the evidence which was given that there had been trouble between the husband and wife, and the husband had for some time been making accusations against his wife and the co-respondent Howard. When the wife left the husband in June, 1951, she went directly to the house of the co-respondent, who lived with his mother and two grown-up sisters. She was then some three months pregnant. She said that she had nowhere else to go. The child was born on December 22, 1951, and the wife gave the child the odd name of Joffena. She was registered by the mother as the child of the husband and wife. Joffre was the Christian name of the co-respondent. There are many circumstances which gave rise to suspicion, to say the least, as to the paternity of the child.

When the case was before the commissioner in January, 1954, a body of evidence was called before him. The commissioner came to the conclusion that the wife's evidence was worth nothing. The husband claimed that the child was not his child. He alleged that there had been an adulterous association between his wife and the co-respondent for some months before his wife left him, and that that was the cause of the trouble between the two of them.

The commissioner, having said that the wife was an unreliable witness, and that he could not rely upon her evidence, said: "But if one takes the matter by stages and attempts a slight "analysis of it, one ought not merely to jump to the opposite " conclusion that the husband's evidence must be wholly reliable. "It simply means that one puts the wife's evidence out as not "being reliable, almost as if she had not given it."

The husband's evidence was that he had not had sexual intercourse with his wife since January 29, 1951, and that he could not be the father of the child which was born on December 22, 1951. The wife disputed that. She said that sexual intercourse took place between them regularly until they parted. The commissioner was of opinion that she thought that the co-respondent was the father of the child whose paternity was in question, but he pointed out that she might be wrong.

The commissioner asked himself: "What evidence is there "the other way round? There is only the evidence of the husband "as to when intercourse ceased. Mr. Havers says, 'What other "'evidence can you give?' The answer in the circumstances, "I suppose, may very well be that there is none. The answer "may be that it is very unfortunate if he was sharing the same "bed, because then he cannot establish his case in accordance "with the very high standard of proof required. Mr. Havers "answers that, or attempts to answer it, by saying that one "ought to look for corroboration of the husband's story. The "wife thought the co-respondent was the father, quite clearly, "Mr. Havers says, and she thought that because she knew she "had been misconducting herself at the time the child was "conceived, and was not having intercourse with the husband, "otherwise she would not have known who the father was."

The husband said: "My wife and I slept in the same bed "until we parted. There was nowhere else for us to sleep. There "were two beds in the house; three children slept in one; my "wife and I slept in the other, but for months before the parting "we had not had sexual intercourse." The question for the commissioner was, was that established to his satisfaction?

Mr. Havers made complaint of the sentence in the judgment: "The answer may be that it is very unfortunate if he was sharing "the same bed, because then he cannot establish his case in "accordance with the very high standard of proof required." That, Mr. Havers submitted, shows that the commissioner was really adopting the view expressed in Halsbury's Laws of England, 3rd ed., Vol. 3, p. 90, where this sentence appears, which is not very happily expressed: "When husband and wife are shown "to be sleeping together, there being no natural impediment, "the evidence is irresistible that intercourse took place." I do not think that that passage can be regarded as an accurate statement of the law today. For some years now it has been possible for husband and wife to give evidence on a matter of this kind. The present statutory provision is section 32 (1) of the Matrimonial Causes Act, 1950, which is in these terms: "Notwithstanding any rule of law, the evidence of a husband or "wife shall be admissible in any proceedings to prove that marital "intercourse did or did not take place between them during any "period."

Thus, it was open to the husband to give evidence that he had not had intercourse with his wife at any material time, and that evidence was given. It was for the commissioner to determine whether or not he could accept it as the measure of proof required in a case of this kind. Later in his judgment he said: "I have "no doubt that, as a matter of law, that can be taken as "corroboration and it is some corroboration. On the other hand, "ought I to accept the husband's evidence, corroborated to the "extent it is in the way I have just indicated, that though "sleeping with his wife he was not having intercourse with her "at the material time?"

It seems to me that in that passage the commissioner put to himself the real question in the case. He then referred to the judgment of Barnard J. in *Watson* v. *Watson*,[1] and he read this passage from his judgment: ". . . if I had to decide this merely "on a balance of probability I would decide in the husband's "favour . . . but in face of the presumption of law which means "that he must satisfy me beyond all reasonable doubt, I feel "that he has not displaced the presumption. I therefore decide "the issue in favour of the wife."

The commissioner continued: "I can only repeat those words: "If this were a civil case, unhesitatingly I would decide in the

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[1] Ante, 48, 55; [1953] 2 All E.R. 1013.

C. A.
1954

Cotton
v.
Cotton.

Singleton L.J.

" husband's favour. I am more than suspicious that this child " is the child of the co-respondent. I think it probably is. But " that does not seem to me to carry the matter quite far enough. " The husband has got to prove the matter beyond all reasonable " doubt. I have to look at this case as best I can with the " mind of a jury. Not without hesitation, I have come to the " conclusion that the probability is that a jury would not be " willing to go all the way in deciding this issue in the husband's " favour if they were properly directed, and in those circumstances, I must admit with reluctance, because I am very much " inclined to think the real truth is the other way, I must decide " this issue against the husband."

The commissioner was impressed by the fact that the woman, when she was pregnant, went to the house of the co-respondent and lived there. He found it difficult to think that that would have happened if the child she was carrying was not the child of the co-respondent. I find it very difficult myself. He thought, too, that it was highly unlikely that the wife would have given the child the name Joffena unless the co-respondent was the father. So do I. But, notwithstanding that, the commissioner did not find himself able to be satisfied that there had not been sexual intercourse between husband and wife at the material time. He said that, if there was one act of intercourse about the time of the conception of the child, the child might still be the child of the husband, and that it would be wrong, in those circumstances, to declare the child illegitimate, for that virtually would be the result of this proceeding. He did not feel able to say that the husband had proved that he had not had sexual intercourse with his wife at the material time.

The law on the subject is summarized in a comparatively recent authority, *In re Bromage, Public Trustee* v. *Cuthbert (Infant)*.[2] Luxmoore J., having considered various passages in the *Banbury Peerage* case,[3] dealt with the fifth answer and cited from it these words[4]: " Where the legitimacy of a child, " in such a case, is disputed, on the ground that the husband was " not the father of such child, the question to be left to the jury " is, whether the husband was the father of such child, and the " evidence to prove that he was not the father, must be of such " facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between " the husband and wife at any time, when by such intercourse,

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[2] [1935] Ch. 605; 51 T.L.R. 408.

[3] (1811) 1 Sim. & St. 153.

[4] [1935] Ch. 605, 610, 611.

"the husband could by the laws of nature, be the father of such "child." Luxmoore J. continued: "The evidence must, as the "Lord Chancellor said in *Morris* v. *Davies*,[5] 'be such as to "'exclude all doubt, that is, of course, all reasonable doubt in "'the minds of the court or jury, to whom that question is "'submitted.' The question cannot be decided upon a mere "balance of probabilities. To quote Lord Lyndhurst's words: "'That presumption of law is not lightly to be repelled. It is "'not to be broken in upon, or shaken by a mere balance of "'probability; the evidence for the purpose of repelling it must "'be strong, distinct, satisfactory and conclusive.'"

It seems to me that the test applied by the commissioner was the test stated in those passages which I have read. I cannot see that there was any error of law on his part. Mr. Havers said that perhaps he might have taken more authorities to Ipswich and put them before the commissioner. I do not think that that would have carried the case any further. It was a question of fact which had to be decided, and it had to be decided according to that which has been said over the centuries, that the measure of proof in a matter of this kind is, indeed, a strict one. The commissioner thought that that measure of proof was not attained. It would not help anyone if I, or any other member of this court, expressed a view as to the conclusion which we might have reached if we had seen the witnesses and had heard what they had to say. It was a question for the judge of first instance. The husband did not satisfy him as he (the judge) thought he ought to be satisfied before he could decide in the way the husband asked him to decide.

In those circumstances this appeal must be dismissed.

JENKINS L.J. I agree, and have nothing to add.

HODSON L.J. I agree.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co. for Gotelee & Goldsmith, Ipswich; Lyus, Burne & Lyus, Diss, Norfolk; Turner, Martin & Symes, Ipswich.*

B. A. B.

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[5] (1837) 5 Cl. & Fin. 163.

C. A.

1954

Mar. 29, 30; *Apr.* 13.

Singleton, Jenkins and Hodson L.JJ.

GALLOWAY *v.* GALLOWAY.

Infant—Custody—Divorce court—Child born in adultery—Not legitimated by subsequent marriage of parents—Divorce—No jurisdiction to order custody—"Children the marriage of whose parents is the "subject of the proceedings"—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).

Statute — Construction — Re-enactment of section — Judicial opinion expressed meanwhile as to meaning—"Children"—Prima facie meaning "legitimate children."

A wife, on an application for the dissolution of her marriage, asked for orders for the custody and maintenance of the child of herself and her husband born before the marriage and at a time when the husband was married to another woman. The special commissioner held that the court had no jurisdiction to make orders in respect of this particular category of illegitimate child. On appeal by the wife:—

Held (Singleton L.J. dissenting), that the jurisdiction of the court under section 26 (1) of the Matrimonial Causes Act, 1950, did not extend to an illegitimate child born of parents in circumstances precluding its legitimation per subsequens matrimonium under the Legitimacy Act, 1926: to hold otherwise would be to reject a formidable preponderance of judicial opinion expressed over a period of 70 years during which the legislature had preserved, and re-enacted in section 26 (1) of the Act of 1950, in substantially the same form of words, the definition of the children to whom the court's jurisdiction under the subsection extended, namely, "children "the marriage of whose parents is the subject of the proceedings."

Per Singleton L.J. The purpose of section 26 (1) is to make orders for the custody and maintenance of children. Since 1857 the courts have exercised that jurisdiction in respect of two of the three possible categories of illegitimate children arising for consideration under section 26 (1) and its predecessors. The words of the subsection are wide enough to cover the third category, namely, those illegitimate children who cannot be legitimated by the subsequent marriage of their parents; and there is no reason why they should be excluded from the jurisdiction of the court. For the purposes of the subsection only, the test should be "parenthood, not legitimacy," as was stated by Denning L.J. in *Packer* v. *Packer*, ante, 15.

Harrison v. *Harrison* [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346, and view of Morris L.J. in *Packer* v. *Packer*, ante, 15; [1953] 2 All E.R. 127 approved.

Langworthy v. *Langworthy* (1886) 11 P.D. 85; 2 T.L.R. 373 and *Colquitt* v. *Colquitt* [1948] P. 19; 63 T.L.R. 358; [1947] 2 All E.R. 50 considered.

Appeal from Judge Lawson Campbell sitting as special commissioner in divorce at Cambridge.

On May 15, 1952, the petitioner, Rose Helen Galloway, was married to Owen George Galloway. Before that date they had lived together, and on August 17, 1950, the petitioner had given birth to a child, John Allen, of whom the respondent was the father, at a time when he was married to another woman. Later that wife divorced him, and he married the petitioner, the result being that the provisions of the Legitimacy Act, 1926, did not apply to render the child legitimate per subsequens matrimonium.

On August 14, 1953, the petitioner (having obtained leave to do so notwithstanding that three years had not elapsed) presented a petition for the dissolution of her marriage on the grounds of her husband's desertion and adultery. By way of relief she asked, in addition to the dissolution of the marriage, for orders giving custody of the child to her and making provision for his maintenance.

The suit, which was not defended by the husband, was heard by Judge Lawson Campbell, who granted the petitioner a decree of dissolution of the marriage, but refused the application for custody of the child, holding, on the basis of the decision in *Harrison* v. *Harrison*,[1] that the court could not make an order under section 26 (1) of the Matrimonial Causes Act, 1950,[2] for the custody of a child if the child's father or mother was married to another person when the child was born. He gave leave to the petitioner to appeal. The husband was not represented and did not appear on the appeal, but at the suggestion of the court, the Queen's Proctor was represented in order to assist the court.

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[1] [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346.

[2] Matrimonial Causes Act, 1950, s. 26: "(1) In any proceedings for "divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just "with respect to the custody, maintenance and education of the "children the marriage of whose "parents is the subject of the proceedings, or, if it thinks fit, direct "proper proceedings to be taken for "placing the children under the "protection of the court.

"(2) On an application made in "that behalf, the court may, in any "proceedings for restitution of conjugal rights, at any time before "final decree, or, if the respondent "fails to comply therewith, after "final decree, make from time to "time all such orders and provisions "with respect to the custody, maintenance and education of the children of the petitioner and respondent as might have been made by "interim orders if proceedings for "judicial separation had been pending between the same parties.

"(3) On any decree of divorce or "nullity of marriage, the court shall "have power to order the husband, "and on a decree of divorce made on "the ground of the husband's insanity, shall also have power to "order the wife, to secure for the "benefit of the children such gross "sum of money or annual sum of "money as the court may deem "reasonable, and the court may for "that purpose order that it shall be "referred to one of the conveyancing "counsel of the court to settle and "approve a proper deed or instrument to be executed by all "necessary parties."

[NOTE: On May 11, 1953, in *Packer* v. *Packer*,[3] a division of the Court of Appeal (Denning and Morris L.JJ.) heard an appeal from a decision in which *Harrison* v. *Harrison* [1] had been followed, and the court being equally divided in opinion, the appeal was dismissed.]

[The main submissions for the wife and the Queen's Proctor are summarized in the judgment of Jenkins L.J. The following submissions relate to supplementary matters raised in the discussion before the court, and the cases cited are referred to in the judgments of the court.]

Robert Elborne for the wife. If the court has no jurisdiction, the position in this case is that though the wife could get de facto maintenance, she cannot recover maintenance for the child from its father, although he is one of the parties whose marriage is "the subject of the proceedings."

[HODSON L.J. The wife can obtain a maintenance order for herself, and in working it out the court takes the child into consideration. That may achieve the desired result by a side door.]

It is doubtful whether the court is entitled to do that. If an order cannot be made under section 26 (1) there is no enactment under which it can be made, for there appears to be no authority for the proposition of Denning L.J. in *Packer* v. *Packer* [4] that a maintenance order in respect of an illegitimate child can be made under the Guardianship of Infants Acts, 1886 and 1925; if that were possible, it would be unnecessary to seek an order under section 26 (1) of the Act of 1950. The principle laid down in *Woolwich Union* v. *Fulham Union*,[5] that prima facie the meaning of "child" in an Act of Parliament is "legitimate child" unless the statute imports a different meaning, must apply to the word "infant" in the Guardianship of Infants Acts.

[JENKINS L.J. The Chancery Division can make orders for maintenance only for so much a week, whereas the Divorce Division can order whatever the means of the parties allow.]

The purpose of the Legitimacy Act, 1926, was to put a child who could be legitimated under that Act in the same position as legitimate children with respect of its parents' property; but in

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[1] [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346.

[3] Ante, 15; [1953] 2 All E.R. 127.

[4] Ante, 15, 22; [1953] 2 All E.R. 127.

[5] [1906] 2 K.B. 240; 22 T.L.R. 579.

In re Wicks' Marriage Settlement [6] the words "children of the "marriage" in a marriage settlement were held not to be affected by that Act.

[JENKINS L.J. The presumption of legitimacy to which Morris L.J. referred in *Packer* v. *Packer* [7] is strong and difficult to displace. On the present submissions great difficulty might arise where the party who was married to another person at the time of the child's birth was a woman, for then the presumption would arise; the mother might ask for an order for custody of the child on the dissolution of her subsequent marriage to the putative father, and the original husband—the presumptive father—might not be represented at the proceedings for custody.]

But, it is submitted, the order here sought is not an order in rem, which will affect the status of the child. It is conceded that in general the presumption of legitimacy applies in construing "child," but it does not apply here by reason of the special and distinctive wording of section 26 (1), which clearly includes one category of illegitimate children, and the words of which are wide enough to cover another category of such children, namely, the illegitimate child in the present case.

[SINGLETON L.J. The difficulty is that Parliament has in the Act of 1950 used substantially the same form of words as was used in the Matrimonial Causes Act of 1857, and has done so after a different and narrower interpretation than that now contended for had been given to them in most of the judicial decisions throughout the whole of that period.]

It is submitted that the principle contemporanea expositio est fortissima in lege operates, as it has been held to operate in the case of statutes very much older than those incorporating the form of words here being considered: see *Goldsmiths' Company* v. *Wyatt.* [8] It is still open to this court to construe the words. There is no decision on them which binds the court.

James Comyn for the Queen's Proctor. The wording in the relevant Acts has been substantially the same for 97 years, and in only two cases—*M.* v. *M.* [9] and *Packer* v. *Packer* [10]—has the construction now contended for been advanced, though in *Webb* v. *Webb* [11] there are dicta by Karminski J. which might indicate that he considered both constructions possible; but his mind was probably not directed to the two lines of decisions represented on the one hand by *M.* v. *M.*[12] and on the other by *Harrison* v. *Harrison.*[13]

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[6] [1940] Ch. 475; 56 T.L.R. 535.

[7] Ante, 15, 24.

[8] [1907] 1 K.B. 95.

[9] [1946] P. 31; 62 T.L.R. 16; [1946] 2 All E.R. 525.

[10] Ante, 15.

[11] [1952] 1 T.L.R. 453; [1952] 1 All E.R. 527.

The conventional interpretation of "child" in a statute should not be departed from unless the context is clear and compelling. Section 26 (1) is neither clear nor compelling to extend to illegitimate children of the category now under consideration; at most it is merely ambiguous. The reason for the subsection is to cover accidental illegitimacy in the case of void marriages. It was never intended to sweep in areas of possible controversy. If illegitimate children of the present category were intended to be covered, the statute would have included them by clear words. Compare, e.g., the Law Reform (Miscellaneous Provisions) Act, 1934, s. 2 (1), which specifically provides that illegitimate children shall be included.

There may well be situations in which a mother cannot in any circumstances get maintenance for an illegitimate child, even if she had been married to its father; and she would also be barred under the Guardianship of Infants Acts.

Cur. adv. vult.

April 13. The following judgments were read.

SINGLETON L.J. stated the facts and continued: Section 26 (1) (of the Matrimonial Causes Act, 1950) took the place of section 193 of the Judicature Act, 1925, which replaced section 35 of the Matrimonial Causes Act, 1857, as amended by section 4 of the Matrimonial Causes Act, 1859.

For the purposes of this appeal the wording of section 26 (1) of the Matrimonial Causes Act, 1950, is the same as section 35 of the Matrimonial Causes Act, 1857, which first gave power to the court to make orders of custody and maintenance of children: "In any proceedings for divorce or nullity of marriage or judicial "separation, the court may . . . make such provision as appears "just with respect to the custody, maintenance and education "of the children the marriage of whose parents is the subject of "the proceedings. . . ." Section 193 of the Judicature Act, 1925, was in the same terms.

On the face of them the words are wide enough to cover a child of the parties to the proceedings, whether the child is legitimate or illegitimate. There is, however, a long line of authority to show that the word "children" in a statute prima facie means legitimate children. In *The Queen* v. *Inhabitants of Totley*[1] Lord Denman C.J. said that "The law does not contemplate illegitimacy. The proper description of a legitimate child is 'child.'" And see the judgments in *Woolwich Union* v. *Fulham Union*,[2] in which Vaughan Williams J., having stated the general rule as to the meaning of the word "children," added[3]: "It is of course true that that is only prima facie the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute."

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[12] [1946] P. 31.

[13] [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346.

Now, the object of section 35 of the Act of 1857 was to enable the court in a proper case to make provision for the custody and maintenance of "children the marriage of whose parents is the subject of such suit or other proceedings," which is a wider expression than "children of the marriage." It is said with some force that the reason for the introduction of the words was to include children of a marriage which had ceased to be a marriage by reason of a declaration of nullity. Be that so: the court is thereby empowered to make an order in respect of one branch of illegitimate children. What reason can there be for excluding other illegitimate children if the court is satisfied that they are children of parents whose marriage is the subject of the proceedings? It is a question of proof. If an order was made under the original section, or if one is made today under section 26 (1) of the Act of 1950, it was, or is, made for the purposes of the section, and for no other purpose. Barnard J. in *Harrison* v. *Harrison*,[4] thought that the legislature had in mind only children of the marriage. That appears to me to be too narrow a construction to put on the words of the section. In *Colquitt* v. *Colquitt*[5] the divisional court held that the words of section 193 of the Judicature Act, 1925, were wide enough to cover the case of a child who, by reason of the subsequent marriage of the parents, was rendered legitimate under the provisions of the Legitimacy Act, 1926.

Thus in the history of this legislation there are, or have been, for consideration three different branches of illegitimate children:

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[1] (1845) 7 Q.B. 596, 600.

[2] [1906] 2 K.B. 240; 22 T.L.R. 579.

[3] [1906] 2 K.B. 246, 247.

[4] [1951] P. 476; [1951] 2 T.L.R. 243; [1951] 2 All E.R. 346.

[5] [1948] P. 19; 63 T.L.R. 358; [1947] 2 All E.R. 50.

C. A.
1954

GALLOWAY
v.
GALLOWAY.

Singleton L.J.

1. The offspring of a marriage declared void. It is clear from the decision of this court in *Langworthy* v. *Langworthy*,[6] that an order under section 35 of the Act of 1857 can be made in respect of children of such a union. In the case of a decree in respect of a voidable marriage under section 7 (2) of the Matrimonial Causes Act, 1937 (now replaced by section 9 of the Act of 1950) it is provided that any child born of a marriage avoided pursuant to paragraphs (*b*) and (*c*) of subsection (1) shall be a legitimate child of the parties.

2. Children born before the marriage of their parents who are born illegitimate but who are legitimized by the subsequent marriage of their parents. Under the decision in *Colquitt's* case[7] an order under the section can be made in respect of any such children.

3. Children born before the marriage of their parents who are not legitimized by the subsequent marriage of their parents owing to the fact that at the time of the birth one of the parents was married to someone else.

It is under this last category that the question in this case arises; and it is well to remember that there might be a child three years old falling under head 3, and a child two years old under head 2. Why should there be a distinction between the two, if it be right to say that the object of the section is to provide for the maintenance, etc., of children the marriage of whose parents is the subject of the proceedings?

The answer to this question seems to be the view taken over many years as to the meaning of the word "children." The decision in *Green* v. *Green*[8] did not meet with the approval of the divisional court in *Colquitt's* case,[9] but I do not see that doubt was cast upon the words of Lord Merrivale P.[10]: "An "order for custody in a divorce suit—for reasons which I will "presently point out—implies a finding of legitimacy. . . . Some "discussion took place at the hearing before me as to whether "an order for custody in this case necessarily involves a finding "or declaration of legitimacy. That this is so appears upon "perusal of the statute which empowers the court to grant "custody—originally the Matrimonial Causes Act, 1857, s. 35, "and now the Judicature Act, 1925, s. 193. 'Children' in "these enactments means legitimate children in the sense that "at the time of the suit they are legitimate." It is for this court to say whether those words can stand in view of the object of the section and in view of the fact that it must in its inception have been intended to apply to one class of illegitimate children. A similar view was expressed by Lord Merriman in *Colquitt's* case.[11]

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[6] (1886) 11 P.D. 85; 2 T.L.R. 373.

[7] [1948] P. 19.

[8] [1929] P. 101; 45 T.L.R. 7.

[9] [1948] P. 19.

[10] [1929] P. 101, 104.

One of the difficulties in the way of giving a literal meaning to the words of section 26 (1) is the reluctance of judges over the years to treat as " children the marriage of whose parents is the " subject of the proceedings " any children except legitimate children (apart from nullity cases). The decision in *Colquitt's* case [11] gave an extended meaning to the words of the section, though as a matter of construction I do not find it easy to read into the then section words which would bring within it a child who was illegitimate prior to the passing of the Legitimacy Act, 1926, if the child was not already covered by its terms.

Another difficulty is that the same words were repeated in the Act of 1950 after the decision of the Divisional Court in *Colquitt's* case.[11] Still, it may well be that it was realized that there was a difference of opinion which the legislature left to the courts to determine. (In the year 1946 Denning J. in *M.* v. *M.*[12] had said that the test was " parenthood and not legitimacy.")

I do not find much help from other sections of the Act of 1950, nor from the different expressions in subsections (1), (2) and (3) of section 26 itself.

There is no decision of this court which binds us. An appeal similar to this was heard by Denning L.J. and Morris L.J. last year, namely, *Packer* v. *Packer*.[13] The Lords Justices held different opinions, as a result of which the appeal was dismissed in a case in which the decision of *Harrison* v. *Harrison* [14] had been followed by a special commissioner. The opinion of Denning L.J. was that [15] " contrary to the view expressed in *Harrison* v. " *Harrison*,[16] section 26 (1) of the Matrimonial Causes Act, " 1950, includes illegitimate as well as legitimate children, and " that the test of the jurisdiction of the divorce court to make " orders in respect of children on dissolution of marriage is, there" fore, parenthood and not legitimacy." He considered that " such a construction is consistent with reason and good sense

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[11] [1948] P. 19, 24.

[12] [1946] P. 31, 33; 62 T.L.R. 16; [1946] 2 All E.R. 525.

[13] Ante, 15; [1953] 2 All E.R. 127.

[14] [1951] P. 476.

[15] Ante, 15.

[16] [1951] P. 476.

"and with the express power given by the section to make provision for the illegitimate children of void marriages."

The opinion of Morris L.J.[17] was that "the word 'children' "in section 26 (1) does not include illegitimate children. The "prima facie meaning of the word 'child' or 'children' in a "statute is that of a legitimate child or legitimate children, unless "a wider meaning is more consonant with the object of the "statute. The use of the phrase 'the children the marriage of "'whose parents is the subject of the proceedings' in section 26 "(1) is not intended to confer a wider meaning on the word "'children,' but refers only to the express power given to the "court by the section in respect of the children of void "marriages."

Denning L.J. put the case in this way[18]: "I see no reason "for confining the section to legitimate children. On the con-"trary, there are strong reasons why it must extend to illegitimate "children as well as legitimate children. That is shown by the "fact that the section applies not only to proceedings for divorce "but also to proceedings for nullity. It applies, for instance, to "nullity on the ground of affinity, bigamy or want of form; and "the court can make provision for the children of incestuous or "bigamous or invalid marriages, although those children are "clearly illegitimate: see *Langworthy* v. *Langworthy*.[19] Once "the word 'children' in the section is interpreted so as to include "illegitimate children, then the jurisdiction of the Divorce Court "to make provision under section 26 (1) depends on three "requisites being fulfilled: (i) the application must be made in "'proceedings for divorce or nullity of marriage or judicial separa-"tion'; (ii) the application must relate to 'children,' legitimate "or illegitimate; and (iii) 'the marriage of the parents' of those "children must be 'the subject of the proceedings.' When the "section is analysed in that way it is clear that the test of "jurisdiction is parenthood, not legitimacy."

I am impressed by this reasoning. It gives to the words of section 26 (1) their natural meaning, and, if it is adopted, it enables the court to carry out the purposes of the subsection, which are to make orders for custody and maintenance. Section 35 of the Act of 1857 undoubtedly enabled an order to be made in respect of one class of illegitimate children. I cannot see why another class should be excluded if, as I think, the words of the subsection are sufficiently wide to cover them. It seems to me that it is more consonant with the object of the statute to include them. To include those within head 1 and head 2 above, and to exclude those within head 3, appears to me to defeat in part the object of section 26 (1), and to be devoid of any real foundation.

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[17] Ante, 15, 16.

[18] Ibid. 21.

[19] 11 P.D. 85.

Two things should always be remembered when an order is desired. The first is the necessity of proof that the child is a child the marriage of whose parents is the subject of the proceedings; and the second is that an order made is one made under and for the purposes of the section, and for no other purpose.

In my opinion no good reason is shown for limiting the meaning of the words of section 26 (1) in the way that has been suggested; they should be given the meaning which on the face of them they bear, and the court ought not to be hindered from so holding by judgments as to the meaning of the word "children" in other Acts of Parliament. Only thus can the full purpose of the subsection be achieved.

I would allow the appeal; but as the other members of the court take an opposite view the appeal will be dismissed. It is with great hesitation that I venture to express on this difficult question an opinion different from that held by my brethren. It may be that in the result there will be a change in the law, for it cannot be doubted that the court ought to have power to make an order for the custody and maintenance of a child of the kind sought in this case if the parenthood is clearly established.

JENKINS L.J. The question in the appeal is in effect whether on the true construction of section 26 (1) of the Matrimonial Causes Act, 1950, the jurisdiction of the court over the children of the parties to a marriage which becomes the subject of proceedings under the Act extends to a child born to those parties before their marriage in circumstances precluding its legitimation by such subsequent marriage under the provisions of the Legitimacy Act, 1926.

The husband was not represented on the appeal, and in view of the difficulty and general importance of the question raised, we thought it right to give the Queen's Proctor the opportunity, of which he availed himself, of instructing counsel to appear for the assistance of the court. In the result we have had the advantage of a full and careful argument of both sides of the question by Mr. Elborne for the wife and Mr. Comyn for the Queen's Proctor, and I would express my indebtedness to counsel for the help they have given us. [His Lordship read section 26 of the Matrimonial Causes Act, 1950, and continued:] This section reproduced without any material alteration section 193 of the Judicature Act, 1925, as amended by section 10 (4) of the Matrimonial Causes Act, 1937, which added to section 193 a new subsection (3) in substantially the same terms as subsection (3) of the present section 26. Section 193 of the Judicature Act, 1925, reproduced without any material alteration, as subsection (1), the combined provisions of section 35 of the Matrimonial Causes Act, 1857, and section 4 of the Matrimonial Causes Act, 1859, and, as subsection (2), the provisions of section 6 of the Matrimonial Causes Act, 1884.

It will, perhaps, be convenient to set out in full the sections of the Acts of 1857 and 1859 from which subsection (1) of section 193 of the Act of 1925, now subsection (1) of section 26 of the Act of 1950, is derived.

Section 35 of the Act of 1857 reads: "In any suit or other "proceeding for obtaining a judicial separation or a decree of "nullity of marriage, and on any petition for dissolving a "marriage, the court may from time to time, before making its "final decree, make such interim orders, and may make such "provision in the final decree, as it may deem just and proper "with respect to the custody, maintenance and education of the "children the marriage of whose parents is the subject of such "suit or other proceeding, and may, if it shall think fit, direct "proper proceedings to be taken for placing such children under "the protection of the Court of Chancery."

By section 4 of the Act of 1859: "The court after a final "decree of judicial separation, nullity of marriage, or dissolution "of marriage, may upon application (by petition) for this purpose "make, from time to time, all such orders and provisions with "respect to the custody, maintenance, and education of the "children the marriage of whose parents was the subject of the "decree, or for placing such children under the protection of the "Court of Chancery, as might have been made by such final "decree or by interim orders in case the proceedings for obtaining "such decree were still pending; and all orders under this enact"ment may be made by the judge ordinary alone or with one or "more of the other judges of the court."

The effect of these two sections is combined in section 26 (1) of the Act of 1950 by making the jurisdiction conferred by the subsection exercisable "from time to time, either before or by or "after the final decree."

It is important to observe that section 35 of the Act of 1857, section 193 (1) of the Act of 1925 and section 26 (1) of the Act of 1950 all define the children to whom the jurisdiction extends in substantially the same terms, the words used in the Act of 1857 being " the children the marriage of whose parents is the subject " of such suit or other proceedings," and those used in the Acts of 1925 and 1950 being " the children the marriage of whose " parents is the subject of the proceedings," and that the same formula, mutatis mutandis, appeared in section 4 of the Act of 1859, namely, " the children the marriage of whose parents was " the subject of the decree."

To complete my citations from the statutes I may conveniently collect at this point various references to children in the Act of 1950 or its predecessors of which use was sought to be made in the course of the argument.

In section 26 itself, subsection (2), dealing with proceedings for restitution of conjugal rights, has " the children of the " petitioner and respondent," while subsection (3), which is concerned with secured provision, has " the children " simpliciter.

In section 2 (2) of the Act of 1950 (corresponding to section 1 (2) of the Act of 1937) it is provided that in determining any application for leave to present a petition within three years of the marriage regard shall be had to (inter alia) " the interests of any " children of the marriage."

Section 9 of the Act of 1950 (replacing section 7 (2) of the Act of 1937) provides that: " Where a decree of nullity is granted in " respect of a voidable marriage, any child who would have been " the legitimate child of the parties to the marriage if it had been " dissolved, instead of being annulled, at the date of the decree " shall be deemed to be their legitimate child notwithstanding the " annulment."

Section 23 (1) of the Act of 1950 (replacing section 5 of the Law Reform Act, 1949) empowers the court to make orders for maintenance where a husband has been guilty of wilful neglect to maintain his wife " or the infant children of the marriage."

Section 24 (1) and (2) of the Act of 1950 (replacing subsections (1) and (2) of section 191 of the Act of 1925) enable settlements to be made of a wife's property " for the benefit . . . of the children " of the marriage. . . ." The same phrase occurs in section 45 of the Act of 1857, which was the precursor of subsection (1) of this section.

Section 25 of the Act of 1950 (replacing section 192 of the Act of 1925, which in turn replaced section 5 of the Act of 1859) empowers the court after pronouncing a decree for divorce or nullity of marriage to make orders for the variation of settlements "for the benefit of the children of the marriage," and the court may exercise the powers conferred by the section "notwithstanding that there are no children of the marriage."

Section 30 (3) of the Act of 1950 (replacing section 189 (3) of the Act of 1925, which in turn replaced a corresponding provision contained in section 33 of the Act of 1857) enables the court to direct a settlement of any damages recovered in a petition "for the benefit of the children, if any, of the marriage."

Of the cases to which we were referred as bearing directly on the construction of section 26 (1) of the Act of 1950 or the corresponding earlier enactments, the first in order of date is *Langworthy* v. *Langworthy*,[20] in which a decree nisi had been made declaring a de facto marriage void as not having been solemnized according to law; and the wife applied for an order making provision for the child of this de facto marriage, the relevant sections at that date being section 35 of the Act of 1857 and section 4 of the Act of 1859. The application was opposed by the de facto husband on the ground (inter alia) that there was no right to provision, "for the child of an invalid marriage is not a child of the 'marriage' of its parents."[21] This argument was rejected by the Court of Appeal for the reasons thus stated by Cotton L.J.[21]: "Now, does the enactment apply to this child although there was no valid marriage? I am of opinion that it does. The section refers to the children not 'of the 'marriage' but 'the marriage of whose parents is the subject 'of such suit or other proceedings.' The section includes sentences of nullity of marriage, and must, therefore, in my judgment, be considered as enacting that in cases where there is no valid marriage the children of the union may be provided for. I am of opinion, therefore, that the judge acted within his jurisdiction, and in the circumstances of this case I think that he exercised that jurisdiction reasonably."

We were next referred to a series of cases concerning the effect of the Legitimacy Act, 1926, on the jurisdiction of the court under section 26 (1) of the Act of 1950, or its immediate predecessor, section 193 of the Act of 1925, the question being whether the jurisdiction extended to a child legitimated under the Act of 1926 by the subsequent marriage of its parents which later became the subject of proceedings for dissolution as being a child the marriage of whose parents was the subject of the proceedings. The first case in this series is *Bednall* v. *Bednall*,[22] in which Hill J. held that there was no jurisdiction, on the grounds that in a suit to which only the husband and wife were parties the court was not competent to find the facts necessary to make the child a legitimate child by virtue of the Act of 1926, and that the legitimacy of the child had not otherwise been declared or established in any properly constituted proceedings. In so deciding the judge must be taken to have held, or to have proceeded on the assumption, that the jurisdiction of the court under section 193 of the Act of 1925 where proceedings for dissolution, as distinct from nullity, of marriage were concerned, was confined to legitimate children of the marriage. It does not, however, appear that any argument to the contrary based on the language of section 193 was addressed to the court, as no reference is made in the report to that section or its predecessors.

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[20] 11 P.D. 85.

[21] Ibid. 87, 88, 89.

The next was *Green* v. *Green*,[23] in which Lord Merrivale P. approved and followed *Bednall* v. *Bednall*.[24] *Green* v. *Green*[25] is noteworthy for the fact that the argument now advanced on behalf of the wife was raised apparently for the first time in any reported case, when the Attorney-General, appearing for the King's Proctor, is reported as having said[26]: " It does not appear " from the report " (that is, of *Bednall* v. *Bednall*[27]) " that the " provisions of the Judicature (Consolidation) Act, 1925 (15 & 16 " Geo. 5, c. 49), s. 193, were brought to the notice of the court. " That section re-enacted the former Matrimonial Causes Act, " 1857 (20 & 21 Vict. c. 85), s. 35, giving power to the court " to deal with the custody of children, the marriage of whose " parents is the subject of the suit; that power is not, on the " face of the statutes, confined to the case of children that are " legitimate: *Jackson* (otherwise *Macfarlane*) v. *Jackson*."[28] (I should mention that in that case an order for custody was made in nullity proceedings in respect of a child of the annulled marriage without any argument on the question of jurisdiction, and that it accordingly adds nothing to *Langworthy* v. *Langworthy*.[29]) " Moreover," (the Attorney-General proceeded[30]) " in the " present case the child in question was by the operation of the

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[22] [1927] P. 225; 43 T.L.R. 599.
[23] [1929] P. 101.
[24] [1927] P. 225.
[25] [1929] P. 101.
[26] Ibid. 102, 103.
[27] [1927] P. 225.
[28] [1908] P. 308.
[29] 11 P.D. 85.
[30] [1929] P. 101, 102.

"Legitimacy Act legitimate as from the date of the Act, and "is in the same position as any other child of a marriage."

The case is also noteworthy for the views of Lord Merrivale P. on the present question, which are thus expressed[31]: "The "Legitimacy Act, 1926, extends legitimacy in fact to issue otherwise illegitimate. It also provides for ascertainment by legal "process of status of the legitimacy so introduced. An order for "custody in a divorce suit—for reasons which I will presently "point out—implies a finding of legitimacy. This was recognized "in *Bednall* v. *Bednall*.[32] A declaration of legitimacy was there "sought with a consequential grant of custody. In the present "case no declaration of legitimacy was prayed, but this does not "help the now petitioner. . . . Some discussion took place at "the hearing before me as to whether an order for custody in this "case necessarily involves a finding or declaration of legitimacy. "That this is so appears upon perusal of the statute which "empowers the court to grant custody—originally the Matrimonial Causes Act, 1857, s. 35, and now the Judicature Act, "1925, s. 193. 'Children' in these enactments means legitimate children in the sense that at the time of the suit they "are legitimate. Ascertainment of their legitimacy is as necessary when the Legitimacy Act, 1926, is invoked, as it would "be if parties of foreign origin, who under their native law had "legitimatized ante-nuptial offspring, should afterwards become "naturalised or domiciled here, and be parties in a matrimonial "suit."

Next, in *Jones* v. *Jones*,[33] Hill J. followed his own decision in *Bednall* v. *Bednall*[34] and that of Lord Merrivale P. in *Green* v. *Green*.[35]

A different view was taken by Denning J. in *M.* v. *M.*,[36] where he held that the subsequent marriage of the natural parents of a child in circumstances rendering the child legitimate according to the terms of the Act of 1926 sufficed to give the court jurisdiction under section 193 of the Act of 1925 without legitimation proceedings. Moreover, the judge went further and expressed the view that the test of jurisdiction under section 193 of the Act of 1925 was "parenthood not legitimacy," a view which, if accepted, would entitle the wife to succeed in her application for custody in the present case, subject to her evidence

[31] [1929] P. 104, 105.
[32] [1927] P. 225.
[33] (1929) 45 T.L.R. 292.
[34] [1927] P. 225.
[35] [1929] P.101.
[36] [1946] P. 31.

as to the husband's paternity of the child being accepted as sufficient.

The effect of the Legitimacy Act, 1926, was next considered by a Divisional Court (Lord Merriman P. and Jones J.) in *Colquitt* v. *Colquitt*,[37] where the question for decision was whether a child who had been legitimated under the provisions of the Act of 1926, but had not been the subject of any proceedings in which his legitimation had been declared or established, was " a child of the marriage " within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925. Lord Merriman P., delivering the judgment of the court, stated the questions for consideration this way [38]: " We " are confronted here with two separate points, one of which is of " importance both to the jurisdiction of this division and to the " jurisdiction of magistrates' courts with regard to custody, while " the other affects only the jurisdiction of magistrates' courts. " The first point is whether *Bednall* v. *Bednall*,[39] *Green* v. " *Green* [40] and *Jones* v. *Jones*,[41] were rightly decided. It was " held in these cases that the Divorce Court has no jurisdiction " under section 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, to deal with the custody of a legitimated " child as being ' a child, the marriage of whose parents is the " ' subject of the proceedings ' unless and until a formal declaration of legitimacy by virtue of the Legitimacy Act, 1926, had " been obtained. Manifestly, if these cases were rightly decided " in relation to the words used in section 193 of the Supreme " Court of Judicature (Consolidation) Act, 1925, the absence of " such a declaration of legitimacy would be equally fatal to the " jurisdiction to treat a legitimated child as ' a child of the " ' marriage ' within the meaning of the Summary Jurisdiction " (Separation and Maintenance) Acts, 1895 to 1925. This point, " therefore, affects both jurisdictions. The second point is " whether, even if these cases are held to be wrongly decided, " and Denning J.'s decision in *M.* v. *M.*[42] is held to be right, it " would still be impossible to hold that a legitimated child is ' a " ' child of the marriage ' within the meaning of the Summary " Jurisdiction (Separation and Maintenance) Acts, although he is " a ' child of the parents whose marriage is the subject of the " ' proceedings ' within the meaning of section 193 of the " Supreme Court of Judicature (Consolidation) Act, 1925."

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[37] [1948] P. 19.

[38] Ibid. 22–3.

[39] [1927] P. 225.

[40] [1929] P. 101.

[41] 45 T.L.R. 292.

[42] [1946] P. 31.

The President then went on to consider whether *Bednall* v. *Bednall*[43] and the cases following it (that is, *Green* v. *Green*[44] and *Jones* v. *Jones*[45]) or *M.* v. *M.*[46] were rightly decided, and in the course of his observations on that question he said this[47]: "In *M.* v. *M.*[48] Denning J. placed great reliance on the decision "of the Court of Appeal in *Langworthy* v. *Langworthy*,[49] which "is referred to as showing that the test under section 193 of the "Supreme Court of Judicature (Consolidation) Act, 1925, is "'parenthood, not legitimacy.' That case established that a "child of the union who is rendered illegitimate by the annul-"ment of the marriage can be dealt with under section 193, for "the very reason, as is pointed out by Cotton and Fry L.JJ., "that the section expressly refers to nullity proceedings. But "in relation to proceedings for divorce, at any rate, we think that "to say that parenthood, not legitimacy, is the test, goes too far. "It cannot, in our opinion, be suggested that although the parent-"hood is undisputed, an illegitimate child who cannot be legiti-"mated is the subject of custody proceedings under section 193, "on the divorce of the spouses who are, in fact, his parents. "But we agree with Denning J. that the fact that the wording "of section 193 is wide enough to cover the case of a child of the "union rendered illegitimate by the annulment of the marriage "of his parents, tends to support the view that in divorce pro-"ceedings it is also wide enough to include a child who has been "rendered legitimate."

He went on to express the conclusion of the court to the effect that the decisions in *Bednall* v. *Bednall*[50] and the cases which followed it were wrong, and that the decision of Denning J. in *M.* v. *M.*[51] was right, and said[52]: "In our opinion, section 193 "of the Supreme Court of Judicature (Consolidation) Act, 1925, "gives the court jurisdiction in such a case, and a decree of "legitimacy under section 188 of the Supreme Court of Judicature "(Consolidation) Act, 1925, is not a condition precedent to the "exercise of that jurisdiction."

I should next refer to *Harrison* v. *Harrison*,[53] which raised the actual question in issue in the present appeal, the wife having given birth to the child of whom the husband was the father, while the parties were living in adultery, the wife being then married to another man, so that the child was not legitimated by the subsequent marriage of the parties, in proceedings for the dissolution of which an application for custody of the child was made by the wife under section 26 (1) of the Act of 1950. Barnard J., in a considered judgment, held that, as the child was not legitimated by the subsequent marriage of its parents, but remained illegitimate, the court could not make an order for its custody under section 26 (1), following the views expressed on this point by Lord Merrivale P. in *Green* v. *Green*[54] and by the Divisional Court in *Colquitt* v. *Colquitt*,[55] and rejecting the contrary view expressed by Denning J. in *M.* v. *M.*[56] *Harrison* v. *Harrison*[57] was followed in *Webb* v. *Webb*.[58]

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[43] [1927] P. 225.
[44] [1929] P. 101.
[45] 45 T.L.R. 292.
[46] [1946] P. 31.
[47] [1948] P. 19, 23, 24.
[48] [1946] P. 31.
[49] 11 P.D. 85.
[50] [1927] P. 225.
[51] [1946] P. 31.
[52] [1948] P. 19, 24–5.
[53] [1951] P. 476.

Finally, *Packer* v. *Packer*[59] came before a division of this court consisting of two members, Denning and Morris L.JJ., on appeal from a special commissioner in divorce, who, on facts indistinguishable from those of the present case, had held on the authority of *Harrison* v. *Harrison*[60] that the court had no jurisdiction under section 26 (1) to make an order for the maintenance of the illegitimate and unlegitimated child to whom the application related. On the hearing of the appeal Denning L.J. adhered to the view he had expressed in *M.* v. *M.*[61] and was for allowing the appeal on the ground that section 26 (1) did extend to illegitimate children. Morris L.J., on the other hand, was for dismissing the appeal on the ground that section 26 (1) did not so extend, and the court being thus equally divided, the appeal was dismissed.

In this state of the authorities it is clear that the commissioner in the present case had no option but to refuse the wife's application for custody of the child on the ground that the court had no jurisdiction to grant it under section 26 (1).

The question is, no doubt, open to review in this court, in the sense that there is no actual decision binding us to accept the conclusion reached in *Harrison* v. *Harrison*[62] as correct. But in holding the case to have been wrongly decided, we would be rejecting a formidable preponderance of judicial opinion expressed or implied in judgments delivered over a period of nearly 70 years. Cotton L.J. could hardly have used the language he did in *Langworthy* v. *Langworthy*[63] if he had understood section 35 of the Act of 1857 and section 4 of the Act of 1859 as giving the court jurisdiction with respect to *any* illegitimate child of whom the parties to the marriage before the court could be shown to have been the natural parents. The decisions in *Bednall* v. *Bednall*,[64] *Green* v. *Green*,[65] *Jones* v. *Jones*[66] *and Colquitt* v. *Colquitt*[67] are wholly inconsistent with the view that the jurisdiction extends to *any* illegitimate child of the parties to the marriage in question, for on that view legitimation would have been an entirely irrelevant consideration. As appears above, Lord Merrivale P. in *Green* v. *Green*[68] and the Divisional Court in *Colquitt* v. *Colquitt*[69] expressed clear opinions to the contrary. Moreover, notwithstanding this manifest trend of judicial opinion in regard to the construction and scope of section 35 of the Act of 1857 and section 4 of the Act of 1859, and of their immediate successor, section 193 of the Act of 1925, the legislature in framing section 26 (1) of the Act of 1950 was content to preserve the same form of words to define the children to whom the jurisdiction extended, namely, " children the marriage of whose parents is the subject " of the proceedings."

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[54] [1929] P. 101.
[55] [1948] P. 19.
[56] [1946] P. 31.
[57] [1951] P. 476.
[58] [1952] 1 T.L.R. 453; [1952] 1 All E.R. 527.
[59] Ante, 15.
[60] [1951] P. 476.
[61] [1946] P. 31.
[62] [1951] P. 476.
[63] 11 P.D. 85.

In these circumstances I am not prepared to hold that we should overrule *Harrison* v. *Harrison*[70] unless I am satisfied that the construction of section 26 (1) on which it is based is clearly untenable.

The main arguments in support of the appeal may be thus summarized: (1) section 26 (1) does not confer the jurisdiction with respect to " children of the marriage which is the subject of " the proceedings," but with respect to " children the marriage " of whose parents is the subject of the proceedings." This peculiar periphrasis, as contrasted with the expression " children " of the marriage " used in the various other sections referred to above, must have been used advisedly and for some purpose. It is literally apt to include illegitimate children whose natural parents subsequent to their birth contract a marriage which becomes the subject of proceedings. (2) Admittedly the words " child " or " children " in an Act of Parliament prima facie mean " legitimate child " or " legitimate children." (See *Woolwich Union* v. *Fulham Union*.[71]) But section 26 (1) extends to proceedings for nullity of marriage, and therefore to children of void marriages who must clearly be illegitimate. As the law stood in 1857 and 1925 this category of illegitimacy was wider than it is now, as it included children of voidable marriages when annulled, whose case is now covered by the status of legitimacy conferred by section 9 of the Act of 1950. Accordingly the word "children" in this subsection cannot be construed as confined to legitimate children, and must be read as meaning children whether legitimate or illegitimate, and as bearing the same meaning in relation to proceedings for the dissolution of a valid marriage as it bears in relation to proceedings for nullity in respect of a void marriage. (3) Considerations of reasonableness and convenience demand that the construction contended for by the appellant wife should be placed on section 26 (1). An illegitimate and unlegitimated child whose natural parents after its birth contract a marriage which becomes the subject of divorce proceedings is just as much in need of care and provision as a child born illegitimate but legitimated by a subsequent marriage of its natural parents which becomes the subject of divorce proceedings. There might be two illegitimate children in the same family, one born in adultery and therefore not legitimated by the subsequent marriage of its natural parents, the other born at a time when its natural parents were free to marry and therefore legitimated by such subsequent marriage. It is contrary to common sense that the court should have jurisdiction with respect to the second child, but not with respect to the first. The jurisdiction should in reason extend to both in accordance with the needs of both.

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[64] [1927] P. 225.
[65] [1929] P. 101.
[66] 45 T.L.R. 292.
[67] [1948] P. 19.
[68] [1929] P. 101, 104.
[69] [1948] P. 19.
[70] [1951] P. 476.
[71] [1906] 2 K.B. 240, 246, 247.

The main arguments against the appeal are substantially these: (1) "Children" in an Act of Parliament prima facie means "legitimate children" (*Woolwich Union* v. *Fulham Union* [71]). Equally, in an Act of Parliament "parents" prima facie means lawful parents, and does not include a putative father. (2) Therefore in section 26 (1) "children" must be construed as referring to legitimate children and "parents" as referring to lawful parents except in cases in which the circumstances contemplated by the subsection are such that there are, ex hypothesi, no legitimate children and no lawful parents to whom they can refer. (3) Thus admittedly "children" must include illegitimate children and "parents" must include de facto as distinct from lawful parents, where the proceedings in question are proceedings for nullity of a void marriage from which no lawful parenthood or legitimate offspring could arise; but it does not follow that the words should not bear their primary meaning of "legitimate

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[71] [1906] 2 K.B. 240, 246, 247.

"children" and "lawful parents" where the proceedings in question are proceedings for the dissolution of a valid marriage of which there may well have been legitimate children. (4) The marriage referred to in the words "the children the marriage of "whose parents is the subject of the proceedings" must be a "marriage by virtue of which the parents stand to the children in the lawful relationship of parent and child or would so stand on the footing that the marriage was valid. In other words, it must be a marriage on which, or on the validity of which if disputed, the status and rights of the children concerned depend. Otherwise it is a marriage which in no way affects the children, and there is no reason why proceedings in regard to it should give the court jurisdiction over them. For instance, a child born in adultery to natural parents who afterwards marry is and remains an illegitimate child, and neither the marriage nor its subsequent dissolution or annulment affects its status or rights in any way. (5) The extent to which section 26 (1) includes illegitimate children is rightly stated by Cotton L.J. in *Langworthy* v. *Langworthy*.[72] In other words, the children must be children of the marriage concerned whether the marriage is valid or void, and in the latter case the marriage ranks as a marriage and they rank as children of it for the purposes of the subsection although the marriage is actually invalid. (6) The periphrastic form of words used in section 26 (1) and its predecessors was adopted owing to the difficulty which might arise in nullity cases from the use of the expression "children of the marriage"; in other words, to forestall the argument which, notwithstanding this precaution, was, after all, unsuccessfully raised in *Langworthy* v. *Langworthy*.[72] (7) The use of the expression "children of the marriage" in other parts of the Act, for the most part in provisions which may be described as ancillary to the jurisdiction conferred by section 26 (1), is against, rather than in favour of, the appellant's construction of the subsection, particularly where such provisions are traceable to the Acts of 1857 and 1859; while the reference to "the children of the petitioner and respondent" in subsection (2), and to "the children" in subsection (3) are at least equally appropriate to the opposite view. (8) Reasonableness and convenience are matters for the legislature, and not for the court, whose function it is to construe the statute. But the appellant's construction would involve much inconvenience in regard to evidence and procedure in cases of disputed paternity, particularly in the case of the birth of an allegedly illegitimate child to a married woman who subsequently married the putative father. In such a case the presumption of legitimacy would apply, and the paternity of the child would not well be adjudicated upon in the absence of the presumptive father. As to the allegedly unreasonable distinction between a child legitimated by subsequent marriage of its natural parents and a child of the same natural parents not so legitimated, the short answer is that, as the law stood when section 35 of the Act of 1857 was framed, both would have been illegitimate, and neither would have been within the jurisdiction conferred by the section. The construction of the almost identical terms of the re-enacted provisions should not be altered because in the meantime Parliament has thought fit to alter the position of one and not the other of these hypothetical children.

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[72] 11 P.D. 85.

For my part, I find the arguments against the appeal on the whole more cogent than those adduced in support of it, and am disposed to adopt the reasoning contained in the judgments of Barnard J. in *Harrison* v. *Harrison*[73] and of Morris L.J. in *Packer* v. *Packer*[74] in preference to that of Denning L.J. in the last-mentioned case.[74]

At all events it is, to my mind, clear that the arguments in support of the appeal afford no sufficiently cogent reason for departing from what may fairly be described as having been the received interpretation of section 26 (1) and its predecessors over so long a period.

In my view, therefore, this appeal fails and should be dismissed.

HODSON L.J. The question in this appeal is whether the petitioner is in law entitled to an order for the custody of a child born to her as a result of intercourse with the respondent whom she subsequently married, the child having been born at a time when the respondent was married to another woman.

The circumstances of the child's birth preclude legitimation per subsequens matrimonium under the provisions of the Legitimacy Act, 1926, and custody has accordingly been refused by Judge Lawson Campbell sitting as a special commissioner in divorce on November 26, 1953.

The question depends on the construction of section 26 (1) of the Matrimonial Causes Act, 1950, which is in these terms: "In "any proceedings for divorce or nullity of marriage or judicial

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[73] [1951] P. 476.

[74] Ante, 15.

" separation, the court may . . . make such provision as appears " just with respect to the custody, maintenance and education of " the children the marriage of whose parents is the subject of the " proceedings. . . ."

The section is the successor of section 35 of the Matrimonial Causes Act, 1857, as amended by section 4 of the Matrimonial Causes Act, 1859, which was itself replaced without material alteration by section 193 (1) of the Judicature Act, 1925, the predecessor of the section now in force.

The argument for the appellant can be stated shortly: (1) The proceedings are proceedings for divorce. (2) The application relates to a child. (3) The marriage of the parents of the child is the subject of the proceedings. Accordingly, the language of the section clearly covers the application made in this case, and on the facts an order should be made.

This argument is taken from the judgment of Denning L.J. in *Packer* v. *Packer*,[74] who expressed the opinion that " the test of " jurisdiction is parenthood and not legitimacy." In this case he adhered to the view he had previously expressed in *M.* v. *M.*[75] when sitting at first instance.

The construction contended for by the appellant is covered by the literal meaning of the words of the section, and if the section stood in isolation from the other sections of the Act of 1950 and their predecessors, and were bare of relevant authority, I think that it would be difficult to resist the appellant's argument.

The section, however, does not stand in isolation, and there are a number of other provisions in the Act of 1950 and its predecessors which are relevant to the question under consideration.

Section 2 (2) of the Act of 1950 provides that in considering any application for leave to present a petition for divorce within three years of the marriage regard shall be had to " . . . the " interests of any children of the marriage." Section 23 (1) of the same Act gives power to make orders for maintenance when a husband has been guilty of wilful neglect to maintain his wife " or the infant children of the marriage."

Section 24 (1) gives power to make settlements of the property of a guilty wife " for the benefit of the innocent party, " and of the children of the marriage or either or any of them." Section 24 (2) gives a similar power in suits for restitution of conjugal rights brought by husbands to order settlements to be made " for the benefit of the petitioner and of the children of the " marriage or either or any of them."

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[74] Ante, 15, 21.

[75] [1946] P. 31.

Section 25 enables the court after pronouncing a decree for divorce or for nullity of marriage, to make orders with reference to the application of the settled property " either for the benefit " of the children of the marriage or of the parties to the marriage, " as the court thinks fit."

Section 26 (2) enables the court in proceedings for restitution of conjugal rights to make " orders and provisions with respect " to the custody, maintenance and education of the children of " the petitioner and respondent."

Section 26 (3) gives power on every decree of divorce or nullity to order the husband and, in certain cases, the wife " to secure " for the benefit of the children such gross sum of money or " annual sum of money as the court may deem reasonable."

The powers of the court are thus, in many of the cases which are dealt with by the sections which I have mentioned, plainly limited to the children of the marriage, and one asks the question, why did the legislature in 1857 select the different language of section 35 which is substantially the same as that employed in section 26 (1) of the Act of 1950?

The answer hitherto accepted was, I think, given by Cotton L.J. in *Langworthy* v. *Langworthy*.[76] In that case a child was born of a union held by the court to be null and void, and the Lord Justice used this language in speaking of section 35 of the Act of 1857 [77]: " Now, does the enactment apply to this child although " there was no valid marriage? I am of opinion that it does. " The section refers to the children not ' of the marriage ' but " ' the marriage of whose parents is the subject of such suit or " ' other proceedings.' The section includes sentences of nullity " of marriage and must, therefore, in my judgment, be considered " as enacting that in cases where there is no valid marriage the " children of the union may be provided for."

If this is a full explanation of the language of the section, as I think it is, I agree with Morris L.J., who held in *Packer's* case [78] that section 26 (1) of the Act of 1950 (reproducing section 35 of the Act of 1857) refers to children of the marriage union even when such marriage is declared to be null and void. In my opinion, however, it does not follow that the words of the section in their context are wide enough to cover children who are not children of the marriage union.

[76] 11 P.D. 85.

[77] Ibid. 88–9.

[78] Ante, 15.

The legal meaning of "children of the marriage" has altered since 1857 by the addition to their number of legitimated children, for in 1926 the Legitimacy Act was passed. This Act for the first time introduced legitimation per subsequens matrimonium into the law of this country, and a class of persons hitherto illegitimate became legitimized when the necessary facts existed. The effect of this legislation was to render such persons legitimate whether or not the necessary steps were taken to obtain a declaration of legitimacy by appropriate proceedings. It was at first considered that such children could not form the subject-matter of an order for custody unless formal proceedings had been taken for a declaration of their legitimacy. In *Bednall* v. *Bednall*,[79] Hill J. reached this conclusion on the ground that, in a suit to which only the husband and wife were parties, the court was not competent to find the facts necessary to make the child a legitimated child by virtue of the Legitimacy Act, 1926. The same judge reached a like conclusion in a later case, namely, *Jones* v. *Jones*,[80] although in that case steps had been taken to re-register the child in accordance with the provisions of the Legitimacy Act, 1926.

Between these two cases the question was argued before Lord Merrivale P. in *Green* v. *Green*,[81] the Attorney-General appearing on behalf of the King's Proctor to assist the court. The Attorney-General addressed to the court the very argument now put forward by the appellant that, on the true construction of the relevant section, the power to make orders for custody was not confined to legitimate children. If this argument had been accepted there would have been no need to consider the question of legitimacy under the Act of 1926. The President, however, must have rejected this argument, for he based his decision on the same ground as that upon which Hill J. had made his stand, namely, that in proceedings for divorce an order for custody of a child alleged to be legitimated by the marriage of its natural parents cannot be made where the child has not already been declared to be legitimated.

The President was of opinion that an order for custody would imply a finding or declaration of legitimacy. He said [82]: "That "this is so appears upon perusal of the statute which empowers "the court to grant custody—originally the Matrimonial Causes "Act, 1857, s. 35, and now the Judicature Act, 1925, s. 193.

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[79] [1927] P. 225, 226.
[80] 45 T.L.R. 292.
[81] [1929] P. 101.
[82] Ibid. 104.

" 'Children' in these enactments means legitimate children in " the sense that at the time of the suit they are legitimate."

It will be seen that in these cases the order for custody was refused because it was considered that in effect the order would operate "in rem" and not because the children concerned could not, if the appropriate steps were taken, be brought within the scope of section 193 of the Act.

These cases were overruled on this point by a Divisional Court consisting of Lord Merriman P. and Jones J. in *Colquitt* v. *Colquitt*,[83] where the court held that a decree of legitimacy under section 188 of the Judicature Act, 1925, was not a condition precedent to the exercise of the jurisdiction to make an order for custody of a child legitimated by the subsequent marriage of his parents and by virtue of the provisions of the Legitimacy Act, 1926.

The court followed the view expressed by Denning J. in *M.* v. *M.*[84] that the question of custody was an issue to be decided between the parents (*Thomasset* v. *Thomasset*,[85] *per* Lindley L.J.) and pointed out that in an earlier case of *Evans* v. *Evans and Blyth* [86] the court had directed an issue to be tried as to the status of a child in proceedings for variation of a marriage settlement without proceedings under the Legitimacy Act having been taken. The court did not, however, accept the view which had been propounded by Denning J. in *M.* v. *M.*,[87] that where parenthood is undisputed an illegitimate child who cannot be legitimated is the subject of custody proceedings under section 193 on the divorce of the spouses who are in fact his parents, and did not question the contrary view expressed or implied in the overruled cases to which I have referred. This case was decided in 1947, and affirms the construction of section 193 and its predecessor which, as I think the authorities show, had hitherto generally been held.

It is to be noted that when section 193 was re-enacted in section 26 of the Act of 1950 it was reproduced in the same form, and the legislature may thus be taken, if not to have accepted the construction placed on the section by the courts, at least to have missed the opportunity of correcting a misconstruction by making it clear that illegitimate children who could not be

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[83] [1948] P. 19.

[84] [1946] P. 31.

[85] [1894] P. 295, 301; 10 T.L.R. 591.

[86] [1904] P. 274; 20 T.L.R. 516.

[87] [1946] P. 31.

C. A.
1954

GALLOWAY
v.
GALLOWAY.

Hodson L.J.

legitimated by the subsequent marriage of their parents were proper subjects of orders for custody.

In my opinion the construction of the section hitherto generally accepted is further supported by authority as exemplified by such cases as *Woolwich Union* v. *Fulham Union*,[88] where Vaughan Williams L.J. pointed out that where the words "child "or children" occur in a statute the prima facie meaning is "legitimate child or legitimate children."[89]

I am in agreement with the judgments delivered by Jenkins L.J. in this case and by Morris L.J. in *Packer* v. *Packer*,[90] and with that given by Barnard J. in *Harrison* v. *Harrison*,[91] which was the authority against which the appeal in *Packer* v. *Packer*[92] was directed. In my opinion the wide construction contended for by the appellant should be rejected in favour of that which I have described as the accepted interpretation of the section in question.

I would therefore dismiss the appeal.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Kingsford, Dorman & Co. for Buckle & Co., Peterborough; Queen's Proctor.*

M. M. H.

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[88] [1906] 2 K.B. 240.
[89] Ibid. 246.
[90] Ante, 15.
[91] [1951] P. 476.
[92] Ante, 15.

C. A.
1954
Mar. 15, 16, 17, 18;
Apr. 13.

Singleton, Jenkins and Hodson L.JJ.

OWNERS OF THE DUMB BARGE STONEDALE No. 1
v. MANCHESTER SHIP CANAL CO.
THE STONEDALE No. 1.

Shipping—Limitation of liability—Expenses of raising vessel—Whether "injury or damage"—Harbours and docks—Obstruction to navigation of canal by sunken barge—No physical damage or injury to harbour works—Liability of barge owners for expenses incurred by canal company in removing obstruction—Whether right to limit liability—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 503 *—Harbours, Docks and Piers Clauses Act,* 1847 (10 & 11 *Vict. c.* 27), *ss.* 56, 74 *— Merchant Shipping (Liability of Shipowners and Others) Act,* 1900 (63 & 64 *Vict. c.* 32), *ss.* 1, 3*—Manchester Ship Canal Act,* 1897 (60 & 61 *Vict. c. cviii*), *s.* 9*—Manchester Ship Canal Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c. cxxiv*), *s.* 32 (1) (2).
Dock. Statute.

By section 9 of the Manchester Ship Canal Act, 1897: "The "owners of any vessel . . . which without actual fault or privity of "the owners shall cause any injury or damage to the portion of the "canal" (as therein defined) "or to the banks, locks or works "comprised in such portion shall not be liable in respect of such "injury or damage to an amount exceeding eight pounds for every "registered ton of such vessel."

By section 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900: "The limitation of the liability of the "owners of any ship set by section 503 of the Merchant Shipping "Act, 1894, in respect of loss of or damage to vessels, goods, merchandise, or other things, shall extend and apply to all cases "where (without their actual fault or privity) any loss or damage "is caused to property or rights of any kind, whether on land or "on water, or whether fixed or movable, by reason of the improper "navigation or management of the ship." By section 3: "The "limitation of liability under this Act . . . shall apply whether "the liability arises at common law or under any general or private "Act of Parliament, and notwithstanding anything contained in "such Act."

By section 32 of the Manchester Ship Canal Act, 1936: "(1) "Whenever any vessel is sunk stranded or abandoned in part of "—(*a*) any river canal waterway navigable channel lock or dock "forming part of the harbour or port of Manchester or of the "undertaking . . . the company may . . . cause the vessel to be "raised or removed. . . . (2) The company may recover from the "owner of any such vessel all expenses incurred . . . in connexion "with that vessel. . . ."

The plaintiffs, the owners of the dumb barge *S.* and of the steam tug *W.*, claimed to be entitled to limit their liability in respect of the expenses incurred by the Manchester Ship Canal Co. in raising and removing the barge *S.* which sank, while proceeding up the canal in tow of the tug *W.* The plaintiffs admitted that the sinking of the *S.* was caused by the improper navigation of the *S.* herself and of the tug *W.*, and that it occurred without their owners' actual fault or privity:—

Held, (1) that on the true construction of section 9 of the Act of 1897, the right to limit their liability conferred on the owners of vessels liable to the canal company in respect of "injury "or damage" to the canal works applied only to "physical" injury or damage to the actual structure of the canal or the works connected with it, and there had been no such physical injury or damage here; (2) that the claim of the canal company under section 32 (2) of the Act of 1936 was not a claim in damages, and that the shipowners were therefore not entitled to limit their liability in respect of it.

Dee Conservancy Board v. *McConnell* [1928] 2 K.B. 159 considered.

The Millie [1940] P. 1; 55 T.L.R. 972 approved.

Workington Harbour and Dock Board v. *Towerfield* (*Owners*) [1951] A.C. 112; 66 T.L.R. (Pt. 2) 387; [1950] 2 All E.R. 414 applied.

Decision of Willmer J. [1953] 1 W.L.R. 1241 affirmed.

C. A.
1954

THE STONEDALE No. 1.

APPEAL from Willmer J. on a claim for limitation of liability.

The plaintiffs, Richard Abel & Sons Ld., the owners of the dumb barge *Stonedale No. 1*, and of the steam tug *Warrendale*, sought a decree of limitation of liability in respect of the claim against them arising out of the sinking of the *Stonedale No. 1* in the Manchester Ship Canal while she was proceeding up the canal in tow of the tug *Warrendale*. She caused an obstruction to the navigation of the canal and, in consequence, the defendants, the Manchester Ship Canal Co., under their statutory powers, raised and removed her, charging the plaintiffs with the expenses of so doing. It was admitted that the sinking of the *Stonedale No. 1* was caused by the improper navigation of the *Stonedale No. 1* herself, and of the tug *Warrendale*, and also that it occurred without the actual fault or privity of the owners. No claim was made against the plaintiffs other than for the expenses incurred by the defendants in raising and removing the barge, the cost of which the plaintiffs sought to include in their claim for limitation.

Willmer J. held that the plaintiffs were not entitled to include those expenses and gave judgment in favour of the defendants.

The plaintiffs appealed.

K. S. Carpmael Q.C. and *P. T. Bucknill* for the plaintiffs, the owners of the *Stonedale No. 1*. Section 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, gives a shipowner the right to limit his liability in respect of loss or damage caused by his vessel (without his actual fault or privity) to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the ship; and by section 3 this limitation is applied whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act. The defendants rely on their private Act, the Manchester Ship Canal Act, 1936, s. 32 (1) and (2), to defeat the plaintiffs' claim to limit their liability in respect of the expenses incurred by the canal company in raising and removing the *Stonedale No. 1* which, admittedly, sank in the canal as the result of the improper navigation or management of the plaintiffs' servants but without the plaintiffs' actual fault or privity. There is a common law duty on the harbour authority to keep the waterway free of obstructions (see Temperley's Merchant Shipping Acts, 5th ed., p. 353). The Manchester Ship Canal Act, 1936, s. 32 (1) and (2), does not override the Manchester Ship Canal Act of 1897, nor, a fortiori, the provisions of the Merchant

Shipping (Liability of Shipowners and Others) Act, 1900, a public Act. It is not "damage" only that is specified in section 9 of the Act of 1897, but "injury or damage." [Reference was made to *The Countess* [1] and to *Dee Conservancy Board* v. *McConnell*,[2] including the observations of Scrutton L.J.[3]] Express words would be necessary to take away the right of a shipowner to limit and there are no such express words in the Manchester Ship Canal Act, 1936. Under the Harbours, Docks and Piers Clauses Act, 1847, s. 56, the owner of a wreck is liable for the expenses of removal even though he is not negligent, but he is entitled to abandon and so escape liability; if the wreck is caused by the negligence of his servants he cannot escape liability: see *The Crystal*.[4] [*The Ella* [5] was also referred to.] On the construction of section 56 of the Harbours, Docks and Piers Clauses Act, 1847, see *Barraclough* v. *Brown*,[6] and Temperley's Merchant Shipping Acts, 5th ed., p. 354, note 8. [*The Chr. Knudsen* [7]; *The Cairnbahn* [8] and *The Millie* [9] were also referred to.] There is no reason why the full effect should not be given to the very wide concessions to shipowners under section 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900. The section covers any loss or damage whatever caused by reason of the improper navigation or management of the ship. It applies to everything. It must also apply to loss of life or personal injury on land or water. The court should have in mind section 503 of the Merchant Shipping Act, 1894, which refers to loss of life or personal injury. It is submitted that *The Millie* [9] was wrongly decided. Section 32 of the Manchester Ship Canal Act, 1936, is not apt to give the canal company the full protection where the company itself undertakes the removal of a wreck and charges the expenses against the shipowner.

The decision in *The Cairnbahn*,[10] applying the principles laid down by section 1 of the Maritime Conventions Act, 1911, is in favour of the plaintiffs here. That case was not referred to in the House of Lords in *Workington Harbour and Dock Board* v. *The Towerfield (Owners)*.[11] The latter case concerned the construction of the Harbours, Docks and Piers Clauses Act, 1847, the material section of which was section 74. The wording of that

[1] [1923] A.C. 345.
[2] [1928] 2 K.B. 159.
[3] Ibid. 163.
[4] [1894] A.C. 508; 10 T.L.R. 551.
[5] [1915] P. 111.
[6] [1897] A.C. 615.
[7] [1932] P. 153; 48 T.L.R. 619.
[8] [1914] P. 25; 30 T.L.R. 82.
[9] [1940] P. 1; 55 T.L.R. 972.
[10] [1914] P. 25; 30 T.L.R. 82.
[11] [1951] A.C. 112; 66 T.L.R. (Pt. 2) 387; [1950] 2 All E.R. 414.

section is different from that of section 9 of the Manchester Ship Canal Act, 1897, with which the court is now concerned. It is submitted that the words used in the House of Lords in *The Towerfield*,[11] so far as they are adverse to the plaintiffs here, were obiter. Section 9 of the Manchester Ship Canal Act, 1897, still stands in full force. It would have needed strong words in section 32 of the Manchester Ship Canal Act, 1936, to exclude section 3 of the public Act of 1900. The Act of 1936 should be construed against the promoters. *The Millie*[12] was wrongly decided and should be overruled, and the judgment of Willmer J., in which, against his own expressed inclination, he merely followed *The Millie*,[12] should be reversed. Section 32 of the Act of 1936 does not expressly or by necessary implication exclude the application of section 1 of the Act of 1900 or section 9 of the Act of 1897. The defendants could, in the circumstances of this case, and quite apart from section 32, have recovered from the plaintiffs at common law the damages suffered by the defendants in consequence of the negligence of the plaintiffs' servants, including the reasonable cost of raising and removing the *Stonedale No. 1.* Those damages would clearly have been limited by virtue of section 1 of the Act of 1900, for the plaintiffs' liability to pay them would have been a liability to damages in respect of "loss or damage" to the defendants' rights as statutory proprietors of the canal, which must necessarily include a right to the unobstructed use of the canal. The fact that a statute imposes an absolute liability on the owners of a vessel irrespective of negligence is no ground for excluding limitation in cases in which the damages claimed are found to be due to improper navigation not involving the actual fault or privity of the owners. The language of section 9 is wide enough to include injury or damage in the shape of obstruction to the canal, and in effect confers a right to limitation with respect to all claims for expenses under section 32 of the Act of 1936.

[Reference was also made to *Dee Conservancy Board* v. *McConnell*[13]; *The Chr. Knudsen*[14]; *The Urka*[15]; *The Athelvictor*[16]; *The Mostyn*[17]; *Great Northern Piccadilly and Brompton Ry. Co.* v. *Attorney-General*.[18]] The shipowner is entitled to say in his claim for limitation that the expenses in question are directly due to the acts of negligence set out on the record.

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[11] [1951] A.C. 112.

[12] [1940] P. 1; 55 T.L.R. 972.

[13] [1928] 2 K.B. 159.

[14] [1932] P. 153; 48 T.L.R. 619.

[15] [1953] 1 Lloyd's Rep. 478.

[16] [1946] P. 42.

[17] [1928] A.C. 57; 44 T.L.R. 179.

[18] [1909] A.C. 1; 24 T.L.R. 506.

The appeal should be allowed and a decree of limitation granted.

J. V. Naisby Q.C. and *H. E. G. Browning* for the defendants, the Manchester Ship Canal Co. The expenses incurred in raising and removing the *Stonedale No. 1* cannot be the subject of limitation proceedings whether the right to limit is claimed under section 9 of the Manchester Ship Canal Act, 1897, or under section 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900. The Act of 1897 is confined to physical injury or damage to the canal structure and does not include the expenses of removal of a sunken vessel. Under section 32 of the Act of 1936 the canal company are entitled to recover from the owner of any vessel sunk or stranded in the canal all expenses incurred in raising and removal in full. Those expenses do not fall within section 1 of the Act of 1900. The removal in the present case was done at the express request of the shipowners and they implied that the canal company would be reimbursed the expenses of the removal of the obstruction.

There was no repeal of the Act of 1897 by section 32 of the Act of 1936: the first deals solely with injury or damage; the second deals with the costs of raising and removal of the obstruction. There is no difference between the property described in section 9 of the Act of 1897 and that comprised in section 54 of the Harbours, Docks and Piers Clauses Act, 1847. The improper navigation of the *Stonedale No. 1* is an irrelevant consideration. It was the failure of the plaintiffs to remove the obstruction, and not the negligent making of the obstruction, which was the cause of the expenses being incurred by the canal company. [*The Towerfield*[19] was referred to.] The decision in *The Cairnbahn*[20] has nothing to do with the question under the Act of 1897 in this connexion. If the words of sections 1 and 3 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, are to be construed in the way contended for by the plaintiffs, the wrong-doing shipowner would always escape liability beyond the limit of his tonnage at the expense of the unfortunate canal company. One of the purposes of the Harbours, Docks and Piers Clauses Act, 1847, is to give harbour authorities a simple remedy to recover a debt without having to embark on costly litigation. *The Countess*[21] is not relied on because there the question of the costs of raising the vessel was not argued: it appeared that the costs of raising and removal were paid for by the shipowner adding the sum to the amount of limited liability decreed.

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[19] [1951] A.C. 112; 66 T.L.R. (Pt. 2) 387; [1950] 2 All E.R. 414.

[20] [1914] P. 25; 30 T.L.R. 82.

[21] [1923] A.C. 345.

The right to recover in the present case is for a simple debt incurred by the canal company under its statutory powers on behalf of the shipowners. When a vessel uses the canal there is a contract entered into between shipowner and canal company on the terms of the Canal Act and, if the vessel sinks and becomes an obstruction, it is an implied term that the shipowner will remove the obstruction at his own expense. The cost of employing an independent contractor is not caused by the improper navigation of the vessel; it is caused by the contract between owner and contractor. The cost the canal company has incurred is not caused by improper navigation; it is caused by the canal company having to remove the obstruction. If there had been damage to the canal structure the case would have been quite different; but there is no damage to the canal structure in this case; no loss to the canal company by "improper "navigation" of the ship. Any expense incurred by the canal company is caused solely by the failure of the shipowner to remove his vessel, and is due to that failure—not to "improper "navigation." For the purpose of limitation that is too remote.

[Jenkins L.J. What do you say about "improper manage- "ment"?]

A sunken vessel is entirely out of commission and no longer susceptible to "management" as that term is generally understood when applied to a ship. The shipowner must show that his claim to limit comes clearly within the operation of section 1 of the Act of 1900. The canal company is in the same position as a ship-repairer who has incurred expense in repairing a vessel which has been damaged by the improper navigation of the owner.

The option of the shipowner to remove the obstruction himself was not referred to in the judgment of Willmer J.[22] This option was first given to the owner by section 32 (3) of the Manchester Ship Canal Act, 1936. The main object of that section was to enable the canal company to recover from the shipowner without recourse to litigation. Finally, there was here a contract arising out of the communications exchanged between the parties under which the plaintiffs were liable to pay the whole of the expenses incurred by the defendants in raising and recovering the vessel.

[22] [1953] 1 W.L.R. 1241.

The decision of Willmer J. was right and this appeal ought to be dismissed. [Reference was also made to *The Ronald West* [23] and *The Urka*.[24]]

K. S. Carpmael Q.C. replied.

Cur. adv. vult.

April 13. SINGLETON L.J. read the following judgment: On February 14, 1952, the barge *Stonedale No. 1* and other barges of the plaintiffs were in tow to the plaintiffs' steam tug *Warrendale* in the Manchester Ship Canal. In the course of the towing the *Stonedale No. 1* grounded in the vicinity of Hooton Wharf, sank and became an obstruction.

Telephone conversations took place between the officers of the Manchester Ship Canal Co. and the owners of the barge, and letters passed on the same day, February 14. The letter from the canal company, after referring to the telephone conversation, continues: "We will have to look to you for all costs which will "be incurred in connexion with the marking, raising, or destruc- "tion of the wreck, and shall be glad to receive your undertaking "that liability is admitted. In accordance with the provisions "of the Manchester Ship Canal Act, 1936, I am required to give "you notice unless we have received written intimation of your "intention to yourselves remove the wreck by mid-day on "Saturday, February 16, 1952, we will take such steps as may be "necessary for its removal."

The letter from the plaintiffs, also dated February 14, is in these terms: "Further to our telephone conversation regarding "barge *Stonedale No. 1*, which lies sunk in the Manchester Ship "Canal between Eastham and Ellesmere Port; we confirm "having asked you to proceed with the lifting operations as soon "as possible."

As a result the barge was raised and removed by the defendants, who rendered the plaintiffs an account of the expenses incurred amounting to £7,609 1s. 4d. The plaintiffs did not pay the amount claimed, but in turn commenced this limitation action.

I refer to the statement of claim: having set out in paragraphs 1, 2 and 3 the facts I have mentioned, the plaintiffs pleaded in paragraph 4: "On or about July 22, 1952, the "Manchester Ship Canal Co. made a claim against the plaintiffs

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[23] [1937] P. 212.

[24] [1953] 1 Lloyd's Rep. 478.

"for the said raising of the *Stonedale No. 1* in the sum of "£7,609 1s. 4d. 5. The said sinking was caused by the "improper navigation of the *Stonedale No. 1* and of the *Warrendale* by the servants of the plaintiffs. 6. The said sinking "occurred without the actual fault or privity of the plaintiffs or "any one of them." Paragraph 7 sets out the registered tonnage of the tug and of the barge.

Paragraph 8 reads: "The plaintiffs have reason to believe "that the amount they are liable in respect of the said sinking "will exceed the limit of their statutory liability calculated at "the rate of £8 per ton of the tonnage of the *Stonedale No. 1* and "of the *Warrendale* ascertained as aforesaid. 9. The plaintiffs are "willing and hereby offer to pay into court the sum of "£1,681 2s. 6d., being the aggregate amount of £8 per ton of "the tonnage of the *Stonedale No. 1* and of the *Warrendale* "ascertained as aforesaid together with interest thereon at 4 per "cent. per annum from the date of the said sinking until such "payment." And the plaintiffs claim a declaration that they are not liable beyond the amount of £8 per ton in respect of the tug and the barge, which amount was the sum of £1,681 2s. 6d.

There were further particulars given, to which I need not refer, and the defence denies that the plaintiffs are entitled to the relief they claim. Paragraph 2 of the defence is in these terms: "These defendants say that in accordance with the provisions "of section 32 of the Manchester Ship Canal Act, 1936, they are "entitled to recover from the plaintiffs all expenses incurred by "them under the said section in connexion with raising, "removing, marking, lighting, watching and otherwise controlling the dumb barge *Stonedale No. 1*, and that the plaintiffs "are not entitled to limit their liability under the provisions of "the Merchant Shipping Acts or the Manchester Ship Canal "Act, 1897, in respect of the claim made by these defendants "referred to in paragraph 4 of the statement of claim."

They also plead that by the letter which I have read: "The "plaintiffs requested these defendants to proceed with the lifting "operations of the *Stonedale No. 1* and thereby impliedly undertook to pay to these defendants all expenses incurred by them "in so complying with their request." Willmer J. held that the claim to limit the amount failed. The plaintiffs appeal to this court.

The claim of the defendants was based on section 32 of the Manchester Ship Canal Act, 1936, to which I must refer. The section provides: "(1) Whenever any vessel is sunk stranded or "abandoned in part of—(*a*) any river canal waterway navigable "channel lock or dock forming part of the harbour and port of "Manchester or of the undertaking; or (*b*) any area within which "the company are or may hereafter be empowered to dredge the "bed banks shores and channels of the River Weaver or the "estuary thereof; or (*c*) any area within which the company "are or may hereafter be empowered to dredge the bed banks "shores and channels of the River Mersey or the estuary thereof "for the purpose of making accesses to the Manchester Ship "Canal; the company may if they think fit cause the vessel to "be raised or removed or (in the case of any vessel which it is "not reasonably practicable to remove) to be blown up or otherwise destroyed in such manner as to clear such river canal "waterway navigable channel lock dock or area therefrom. "(2) The company may recover from the owner of any such "vessel all expenses incurred by the company under this section "in connexion with that vessel or in raising removing or saving "any furniture tackle and apparel thereof or any cargo goods "chattels and effects raised or saved therefrom or in marking "lighting buoying or otherwise controlling such vessel either "summarily as a civil debt or as a debt in any court of competent "jurisdiction. Provided always that the company may if they "think fit and shall if so required by the owner of the vessel "cause such vessel and any furniture tackle apparel cargo goods "chattels and effects or any part of the same respectively so "raised removed or saved as aforesaid to be sold in such manner "as they think fit and out of the proceeds of the sale may after "paying any duties of customs or excise which shall be payable "in respect of the said cargo goods chattels and effects reimburse "themselves for any such expenses and shall hold the surplus "of any of those proceeds in trust for the persons entitled thereto "and in case such proceeds shall be insufficient to reimburse "the company such expenses the deficiency may be recovered by "the company in manner aforesaid. (3) The company shall "(except in case of emergency) before raising removing blowing "up or destroying any such vessel under the provisions of this "section give to the owner of the vessel twenty-four hours' notice "of their intention so to do and if within twelve hours after the "expiration of such notice the owner gives to the company notice "in writing of his intention himself to raise and remove the "vessel he shall be at liberty so to do in lieu of the company. . . . "(6) In this section the word 'owner' in relation to any vessel "sunk stranded or abandoned as aforesaid means the owner of "that vessel at the time of the sinking stranding or abandonment "thereof. (7) The powers conferred on the company by this "section shall be in addition to and not in derogation of any other "powers exerciseable by them for or with respect to the removal "of wrecks."

It will be seen that the request for payment of the amount is, on the face of it, unanswerable. The barge was stranded. The defendants complied with the provisions of section 32 and, prima facie, they are entitled to be paid. There is no admission that the amount claimed is correct, but no question has been raised upon it.

The claim of the plaintiffs in the limitation action gives rise to a number of questions. It is common ground that the stranding was due to faulty navigation, and it is not suggested that there was actual fault or privity on the part of the plaintiffs. It is said that the amount expended was due to faulty navigation from which damage flowed, and that the plaintiffs are entitled to limitation of those damages so that no more than £1,681 2s. 6d. is recoverable. There are no other persons claiming.

The right of a shipowner to limit damages has existed for very many years: see *per* Lord Birkenhead in *The Countess.*[1] The Merchant Shipping Act, 1894, s. 503, provides: "(1) The "owners of a ship, British or foreign, shall not, where all or any "of the following occurrences take place without their actual "fault or privity; (that is to say,) (*a*) Where any loss of life "or personal injury is caused to any person being carried in the "ship; (*b*) Where any damage or loss is caused to any goods, "merchandise, or other things whatsoever on board the ship; "(*c*) Where any loss of life or personal injury is caused to any "person carried in any other vessel by reason of the improper "navigation of the ship; (*d*) Where any loss or damage is caused "to any other vessel, or to any goods, merchandise, or other "things whatsoever on board any other vessel, by reason of the "improper navigation of the ship; be liable to damages beyond "the following amounts," and the amounts are set out in the later part of the section.

Paragraphs (*a*) and (*b*) of that subsection give the right generally in respect of loss of life or injury to persons being carried in a ship, or to goods being carried on the ship, against the owners of which the claim is made. In cases of loss of life or injury, or of damage to goods in another ship, the right to limit was given where the occurrence was due to faulty navigation. In all cases the occurrence must be without actual fault or privity of the owners.

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[1] [1923] A.C. 345, 352; 39 T.L.R. 302.

By the Merchant Shipping Act, 1900, s. 1, a considerable extension of the right to limit damages was given. That section provides: "The limitation of the liability of the owners of any "ship set by section five hundred and three of the Merchant "Shipping Act, 1894, in respect of loss of or damage to vessels, "goods, merchandise, or other things, shall extend and apply to "all cases where (without their actual fault or privity) any loss or "damage is caused to property or rights of any kind, whether on "land or on water, or whether fixed or movable, by reason of "the improper navigation or management of the ship." It is claimed that the wording of this section covers the present case, and that the owners are thereby entitled to limit their damages.

Again, section 3 of the Act provides: "The limitation of "liability under this Act shall relate to the whole of any losses "and damages which may arise upon any one distinct occasion, "although such losses and damages may be sustained by more "than one person, and shall apply whether the liability arises "at common law or under any general or private Act of "Parliament, and notwithstanding anything contained in such "Act."

Alternatively, the plaintiffs claim that they are entitled to the right under section 9 of the Manchester Ship Canal Act, 1897, which provides: "The owners of any vessel or of any share in "such vessel which without actual fault or privity of the owners "shall cause any injury or damage to the portion of the canal "extending from the entrance at Eastham (including that "entrance) up to the westerly end of the pier of the Mode Wheel "Locks or to the banks locks or works comprised in such portion "shall not be liable in respect of such injury or damage to an "amount exceeding eight pounds for every registered ton of "such vessel."

The answer of the defendants is that none of these matters arises; that they are not asking for damages. On the contrary, they say that their claim is for payment of expense incurred under the provisions of section 32 of the Act of 1936, and that no question of limitation enters into that.

It is necessary to consider the position of a harbour or dock authority, such as the defendant company, prior to the Act of 1936. The provisions of the Harbours, Docks and Piers Clauses

Act, 1847, were incorporated with their private Acts, the first of which was passed in 1885.

Section 56 of the Harbours, Docks and Piers Clauses Act, 1847, is in these terms: "The harbour master may remove any "wreck or other obstruction to the harbour, dock, or pier, or "the approaches to the same, and also any floating timber which "impedes the navigation thereof, and the expense of removing "any such wreck, obstruction, or floating timber shall be repaid "by the owner of the same; and the harbour master may detain "such wreck or floating timber for securing the expenses, and "on non-payment of such expenses, on demand, may sell such "wreck or floating timber, and out of the proceeds of such sale "pay such expenses, rendering the overplus, if any, to the owner "on demand."

Section 74 provides: "The owner of every vessel or float of "timber shall be answerable to the undertakers for any damage "done by such vessel or float of timber, or by any person "employed about the same, to the harbour, dock, or pier, or the "quays or works connected therewith, and the master or person "having the charge of such vessel or float of timber through "whose wilful act or negligence any such damage is done shall "also be liable to make good the same; and the undertaker may "detain any such vessel or float of timber until sufficient security "has been given for the amount of damage done by the same: "provided always, that nothing herein contained shall extend to "impose any liability for any such damage upon the owner of "any vessel, where such vessel shall at the time when such "damage is caused be in charge of a duly licensed pilot whom "such owner or master is bound by law to employ and put his "vessel in charge of."

Under that section the owners of a vessel are answerable to the authority for any damage done by such vessel to the harbour, dock, or pier, or works connected therewith, whether the damage was caused by negligence or not. Prior to 1900 there was no general right to limit damages of this nature. I assume that the words of section 1 of the Merchant Shipping Act, 1900, are wide enough to give such a right. A claim was made in the initial stages of the *Dee Conservancy Board* v. *McConnell*,[2] but it failed on the words of the section "without their actual fault or privity."

Section 9 of the Manchester Ship Canal Act, 1897, extended the then existing right of shipowners using the ship canal to limit the amount of damages, and provided that where injury or damage was caused by a vessel to the canal (so far as is material to this case), or to the banks, locks, or works comprised therein, the owners were not to be liable in respect of such injury or damage to an amount exceeding £8 for every registered ton of such vessel so long as there was not actual fault or privity of the owners. This section does not mention negligence. I agree with Willmer J. that section 9 does not help the plaintiffs in this case. The stranding of the *Stonedale No. 1* did not cause "injury or damage" to the canal or to the works connected therewith. That is my opinion upon the reading of the section, and it follows, I think, from that which was said in four of the speeches in the House of Lords in *The Towerfield*.[3] In that case it was held that the damage recoverable under section 74 of the Act of 1847 is confined to that physically caused to the harbour works and does not include consequential loss of revenue through inability to use the harbour. I would repeat the words of Lord Radcliffe, who said[4]: "I only wish to make it "plain that in my view the section is confined to damage, not "damages. I think that it covers no more than the actual "physical damage which a vessel may do to the works which con- "stitute the harbour, dock or pier." The introduction of the words "injury or" before the word "damage" in section 9 of the Act of 1897 does not extend the liability.

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[2] [1928] 2 K.B. 159.

I now come to the position arising under section 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900. The words of this section "shall extend and apply to all "cases where . . . any loss or damage is caused to property or "rights of any kind, whether on land or on water, or whether "fixed or movable" are certainly very wide. And by section 3 the limitation of liability applies whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act.

Mr. Carpmael submitted that the present case fell within the words of section 1, and that being so, nothing in section 32 of the Manchester Ship Canal Act, 1936, could take away the right of the owners to limit the damages.

In *The Millie*,[5] which was a case arising under section 32 of the Act of 1936, Langton J. held that the owners were not entitled to limit the damages, and the basis of his decision appears to have been that the words of section 1 of the Merchant Shipping Act, 1900, were not wide enough to cover an expense of this nature. The judge is recorded as having said[6]: "On "the other hand I am very greatly impressed by the inadequacy "of the language, even in this widely drawn section, to cover an "item of expense not immediately connected with the actual "occurrence of the original loss. Without attempting to enter too "deeply into the baffling problem of causation, I doubt whether "this expense can be said to be directly caused by the improper "navigation of the *Millie*, and for both these reasons, though "principally upon the ground of the inadequacy of the language, "I am of opinion that the statute does not cover the expenses "incurred by the canal company."

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[3] [1951] A.C. 112; 66 T.L.R. (Pt. 2) 387; [1950] 2 All E.R. 414.

[4] [1951] A.C. 112, 161.

[5] [1940] P. 1; 55 T.L.R. 972.

It is clear from the judgment of Willmer J. that he found difficulty in following the reasoning of Langton J. on this head. Left to himself, he would have held that the plaintiffs' claim to limit the damages succeeded, but he thought it right to follow the decision of Langton J.

If those responsible for the management of a ship are guilty of faulty navigation (or negligence) which causes damage to others, the measure of damages is governed by the ordinary rule, that is, they are recoverable if they are the natural and probable results of the wrongful act.

In *Dee Conservancy Board* v. *McConnell*[7] Scrutton L.J. said[8]: "What are the damages caused by the negligence of a "person who deposits an obstruction on the soil of another and "so blocks a right of way? I should have thought that if the "person who deposits the obstruction declines to remove it, "which is the position here, the damages are the reasonable "cost of removing it. The second respondents were not bound "to allow this obstruction to remain blocking their berth for all "time; they were entitled to remove it to minimize the damage, "and they incurred the expense which the judge has found to "be the reasonable cost of removing it. It seems to me also that "the first respondents who, as I have said, have the duty of "maintaining a navigable channel, have a common law right "to remove the obstruction. The obstruction was deposited in a "place which affected both respondents who thereupon jointly "made a contract with a salvage association to remove it, the "cost of doing this being paid partly by the one respondent and

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[6] [1940] P. 1, 10.

[7] [1928] 2 K.B. 159.

[8] Ibid. 166–7.

"partly by the other. In those circumstances judgment ought "to have been entered for both respondents for one sum to be "recovered once and not twice." It does not appear that those words of Scrutton L.J. were cited to Langton J. in *The Millie.*

In *The Cairnbahn* [9] Lord Sumner said [10]: "The word 'loss' "is wide enough to include that form of pecuniary prejudice "which consists in compensating third parties for wrong done "to them by the fault of persons for whose misconduct the party "prejudiced must answer."

It was incumbent on the Manchester Ship Canal Co. to keep open navigation of the canal, and it was in their interest to do so. It seems to me that in an action by them for damages for negligence in a case in which a vessel had stranded and done damage through negligent navigation, and in which they had found it necessary to remove the obstruction, one of the heads of damage would be the cost of removing the obstruction so that the canal could be used for the purpose for which it was constructed. If that be right, it appears to follow that in such a case the shipowners could succeed in a claim to limit their liability under the terms of section 1 of the Merchant Shipping Act, 1900.

But that does not dispose of this appeal. The claim of the plaintiffs is not founded in damages. It is based on section 32 of the Manchester Ship Canal Act, 1936. The section may be said to take the place of section 56 of the Harbours, Docks and Piers Clauses Act, 1847. Under the last-mentioned section the harbour master may remove any wreck or obstruction which impedes navigation, and the expense of removing it "shall be "repaid by the owner of the same," and the harbour-master may claim the wreck for securing the expenses, and on non-payment on demand he may sell the wreck, rendering the overplus (if any) to the owner on demand.

One difficulty which arose on the working of section 56 was that if the owner abandoned the wreck before the expenses were incurred he was no longer the owner for the purposes of the section, and the expenses could not be recovered from him: see *The Crystal.*[11] This difficulty was met by section 32 (6) of the Manchester Ship Canal Act, 1936, by providing that the word "owner" means the owner at the time of the sinking, stranding or abandonment. There are other changes of importance, and it

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[9] [1914] P. 25; 30 T.L.R. 82.

[10] [1914] P. 25, 33.

[11] [1894] A.C. 508; 10 T.L.R. 551.

C. A.
1954

The Stonedale No. 1.

Singleton L.J.

can be said that the section sets up a complete code as to the rights of the Ship Canal Co. whenever any vessel is sunk, stranded or abandoned in the canal as was the *Stonedale No. 1*. In some ways the section limits the powers of the company, or gives additional rights to the shipowners. The company may, if they think fit, cause the vessel to be raised or removed. By subsection (2) the company may recover from the owner of any such vessel all expenses incurred by the company, with a proviso that the company may, and shall if so required by the owner, cause the vessel to be sold. By subsection (3) the company shall (except in case of emergency) before raising, removing, blowing up or destroying any such vessel give to the owner twenty-four hours' notice of their intention so to do, and the owner may within twelve hours give notice of his intention to raise and remove the vessel, in which case, subject to safeguards, he is to be at liberty to do it himself. And subsection (4) provides that the company shall give to the owner seven days' notice before selling. The section is entirely independent of any question of damages. It is essential that navigation of the canal be kept open, and Parliament has given to the company powers to enable them to bring this about as far as possible.

So far as I can find, there is no case in which it has been held that the expense of removing a wreck under the provisions of section 56 of the Act of 1847 falls within the limitation proceedings of section 1 of the Merchant Shipping Act, 1900. It is expense incurred in doing something authorized by the section, and the mode in which it can be recovered is laid down. It appears that a point of this kind might have been taken in *The Countess*.[12] The report of the case in the court of first instance shows that there were heavy claims for damages arising from faulty navigation. It was agreed that the statutory amount of the shipowners' liability calculated in accordance with the Merchant Shipping Acts was £4,468 4s. 9d. There was another sum of £1,048, the expenses of raising and removing the vessel under the powers given by section 7 of the Mersey Docks and Harbour Act, 1912. This section is in some respects similar to section 56 of the Harbours, Docks and Piers Clauses Act, 1847. The board have power to remove a vessel sunk or stranded within the port which, in the judgment of the marine surveyor, is an obstruction to the safe use of the port, or likely so to become, and the board may sell the vessel, and out of the proceeds

[12] [1921] P. 279; [1923] A.C. 345.

retain the expenses to which they have been put. There is no express provision that the board can recover the expenses from the shipowner. No doubt the procedure laid down in section 530 of the Merchant Shipping Act, 1894, would be followed. The shipowners in fact paid into court this additional sum of £1,048. They did not suggest that it was part of the damages incurred through their faulty navigation. In other words, they did not claim that the cost of raising and removing the vessel fell to be included in the £4,468 4s. 9d., the amount to which they were entitled to have the damages limited. This case reached the House of Lords on other points. In the Court of Appeal Atkin L.J. pointed out [13] that the limitation suit did not affect the dock board's right to the expenses incurred in removing the obstruction. It is interesting, at least, to see that the question was not raised by anyone.

The researches of Hodson L.J. have brought to light another authority of some importance, not from the point of view of the decision, but from some words of Scott L.J. which throw light on the problem now before the court. The case is *The Brabo.*[14] The action was brought to recover the expenses of removing a wreck under section 42 of the Tyne Improvement Act, 1890. In the report these words of Scott L.J. appear [15]: "First, "it is necessary to bear in mind the nature of the plaintiffs' "claim. That claim is in respect neither of a contract, express "or implied, nor of a tort . . . it is based on a section in one of the "plaintiffs' special Acts"; and after the Lord Justice had read the agreed judgment of the court in that case he added observations of his own [16]: "There is a further principle of legislative "policy regarding maritime commerce, to which also this appeal "invites public attention, that of limitation of shipowner's "liability. That principle has been applied in the western world "for two centuries or more, the basic rule on the Continent "making the value of the ship at the end of the voyage the limit "of her owner's liability, whereas the United Kingdom in the "middle of last century converted that measure into a sterling "limit per ton of registered tonnage, based on the then average "value of ships. On the Continent the cost of wreck-removal, "when recoverable from the owner of the ship, has always been "treated as one of the marine liabilities of the voyage and, as "such, has been brought within the Continental system of

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[13] [1922] P. 41, 60.

[14] [1947] 2 All E.R. 363; [1948] P. 33; 63 T.L.R. 494.

[15] [1947] 2 All E.R. 363, 367.

[16] Ibid. 370.

C. A.
1954

THE STONEDALE No. 1.

Singleton L.J.

"limitation of shipowner's liability. In the United Kingdom that "has never been the case. The right of recovery was only "obtained from Parliament by the harbour authorities gradually, "and the shipowners were never given the right to limit that "liability." I need say nothing as to the experience of Scott L.J. in this matter. It is worth mentioning that he was leading counsel for the Mersey Docks and Harbour Board in *The Countess*[17] when the case was argued in the Court of Appeal. I have referred to that case and to the words of Atkin L.J.

Under section 32 of the Manchester Ship Canal Act, 1936, there is an additional step, namely, the giving of notice to the owner before the raising or removal of the vessel, upon which Mr. Naisby submitted on behalf of the defendants that the expense of removal was not damages resulting from faulty navigation, but was expense incurred by the company because the shipowner had not upon notice removed his stranded vessel.

I prefer to look upon the case in this way: There is no claim for damages. The company's claim is in respect of an expense incurred by them under the terms of the statute which gives them a right to recover, not damages, but expense incurred in performing their duty or obligation to keep navigation open. If the question is looked at in this way there is no conflict between the private Act and the provisions as to limitation in the Merchant Shipping Acts. The section enables the canal company to recover from the owner all the expenses incurred. The owner cannot avoid a great part of his liability by saying that he was negligent in causing the original obstruction. A decision to the contrary might well result in the owner being much better placed if his vessel, sunk through faulty navigation, was of considerable value, and he left the canal company to raise it and to return it to him. In my judgment an amount payable under section 32 is not an amount of damages, and shipowners are not entitled to limitation in respect of the amount.

Mr. Naisby further submitted that by the telephone conversation, and by the letters to which I have referred, the plaintiffs undertook to pay the reasonable cost of the removal of the barge; in other words, that there was constituted a contract under which the defendants can recover the total amount. I am unable to see that a contractual obligation was entered into. The letters were, in my view, merely procedure under section 32 (3) of the Act of

[17] [1922] P. 41.

1936, and they do not give the defendants any rights outside the terms of that section.

In my opinion, the appeal should be dismissed.

Jenkins L.J. This is an appeal by the plaintiffs, Richard Abel & Sons Ld., the owners of the dumb barge *Stonedale No. 1* and of the steam tug *Warrendale*, from a judgment of Willmer J. dated July 31, 1953, in so far as it pronounced that the plaintiffs were not entitled to limit their liability in respect of a claim by the defendants, the Manchester Ship Canal Co., for the expenses incurred by them in connexion with the raising, removing, marking, lighting, watching and otherwise controlling the wreck of the dumb barge *Stonedale No. 1*.

The casualty giving rise to the defendants' claim occurred on February 14, 1952, when the tug was towing the barge along the defendants' canal inward bound from Eastham Lock, and at a point near Hooton Wharf, owing to improper navigation by the plaintiffs' servants in charge of the two vessels, the barge ran aground and sank, thus causing an obstruction in the canal.

On the same day there were telephone conversations about the casualty between representatives of the parties, in the course of which the defendants told the plaintiffs that the raising of the barge was a matter which needed prompt action because all traffic on the canal had been suspended. The plaintiffs told the defendants that they were not proposing to attempt to raise the barge, but would leave it to the defendants to do so as early as possible so as to minimize delays to traffic, and the defendants asked the plaintiffs to confirm in writing their decision not to raise the barge themselves.

Also on February 14, 1952, the plaintiffs and the defendants wrote to each other letters in the following terms. The letter from the plaintiffs to the defendants reads: "Dear Sir, Further "to our telephone conversation regarding barge *Stonedale 1* which "lies sunk in the Manchester Ship Canal between Eastham and "Ellesmere Port; we confirm having asked you to proceed with "the lifting operations as soon as possible." The letter from the defendants to the plaintiffs reads: "Dear Sirs, Concrete Barge "*Stonedale 1*. With reference to conversation per telephone this "afternoon, with your Mr. Anderson, I confirm that when the "above-named barge was negotiating the Ship Canal inward "bound about 14.45 hours today she was involved in collision "with the outward bound *Snapshot* and subsequently sunk in the "vicinity of Hooton Wharf." That reference to a collision is agreed to have been a mistake, as the barge in fact sank through running aground and not through colliding with any other vessel. The letter continues: "We will have to look to you for all costs "which will be incurred in connexion with the marking, raising "or destruction of the wreck and I shall be glad to receive your "undertaking that liability is admitted. In accordance with the "provisions of the Manchester Ship Canal Act, 1936, I am "required to give you notice unless we have received written "intimation of your intention to yourselves remove the wreck by "mid-day on Saturday, February 16, 1952, we will take such "steps as may be necessary for its removal."

It seems that these letters must have crossed in the post. Neither of them can be regarded as answering the other, and it does not appear that either of them was ever in fact answered. Some reliance was placed upon them on the defendants' side as constituting, in conjunction with the telephone conversations, a contract under which the plaintiffs agreed to pay without limitation the whole of the costs incurred by the defendants in and about the raising of the barge. Without entering upon the merits of that contention at this stage, I would say that, at all events, those letters and telephone conversations must have made it abundantly plain to the plaintiffs that, in default of the plaintiffs raising the barge themselves, the defendants, in exercise of the powers conferred on them by the Manchester Ship Canal Act, 1936, would raise the barge and hold the plaintiffs liable for all expenses incurred in so doing.

The relevant provisions of the Manchester Ship Canal Act, 1936, are contained in section 32 af that Act. My Lord has already sufficiently referred to that section, and I need not read it again. That section may be described as an elaboration of section 56 of the Harbours, Docks and Piers Clauses Act, 1847, which was applied to the canal by the Manchester Ship Canal Act, 1885. Section 56 of the Act of 1847 has, again, been sufficiently referred to by my Lord.

It may be added that the provisions in section 32 of the Act of 1936 as to sale of the vessel and recovery of the expenses out of the proceeds reflect with variations a somewhat similar power contained in section 530 of the Merchant Shipping Act, 1894, which, however, does not appear to have conferred any right of recourse against the owner provisionally in the event of any deficiency in the proceeds of sale. It may also be added that the definition of "owner" in subsection (6) of section 32 appears to have been designed to meet the decision in *The Crystal*[18] to the effect that the "owner" in section 56 of the Act of 1847 means the owner at the time when the expenses are incurred, and therefore does not include a former owner who has abandoned the vessel before that time.

It will be convenient also to refer at this point to section 74 of the Act of 1847, which played some part in the argument, but as my Lord has already read it I do not propose to read it again.

The plaintiffs having declined to raise the barge, the defendants in due course raised it themselves and (as they were expressly entitled to do by the terms of section 32 of the Act of 1936) claimed payment by the plaintiffs of the expenses incurred in so doing, amounting (as claimed by the defendants) to £7,609 1s. 4d. This claim the plaintiffs sought to meet by commencing the present action for limitation of their liability in reliance on section 503 of the Merchant Shipping Act, 1894, as extended by section 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, and, or alternatively, on section 9 of the Manchester Ship Canal Act, 1897.

It is common ground that either of these provisions, if applicable, would have the effect of limiting the plaintiffs' liability to the defendants (whose claim is in fact the only one arising out of the stranding and sinking of the barge) to £8 per ton of the combined tonnage of the tug and the barge, which limited sum is agreed to amount to £1,681 2s. 6d. The casualty in the present case admittedly took place without the plaintiffs' actual fault or privity, but by reason of the improper navigation by their servants of the tug and the barge, and also admittedly took place in that portion of the canal to which section 9 of the Act of 1897 applies.

There appears to have been only one previous case in which the owners of a sunk, stranded or abandoned vessel have claimed limitation of their liability to pay the defendants the expenses incurred by them in exercise of their powers under section 32 of the Act of 1936. That was *The Millie*,[19] where in circumstances not distinguishable in any material respect from those of the present case Langton J. held, apparently with some hesitation, that the owners could not limit their liability in respect of the expenses in question. The primary ground for his decision appears to have been that these expenses were not "loss or "damage . . . to property or rights of any kind" within the meaning of section 1 of the Act of 1900, and therefore could not be made the subject of limitation under that section; but he also considered it at least doubtful whether such expenses could be said to be proximately caused "by the improper navigation or "management of the ship" within the meaning of the same section, a doubt which, if well founded, would afford an additional reason for holding the section inapplicable. It is right that I should here mention two points concerning this decision. First, it appears from the report that Langton J. was erroneously informed by counsel that section 9 of the Act of 1897 applied to the place at which the casualty there in question took place, and consequently referred to it in his judgment as applicable, though without expressing any view as to the scope or effect of the right of limitation thereby conferred. Secondly, Langton J. does not appear to have had cited to him the case of *Dee Conservancy Board* v. *McConnell*,[20] in which it was held that the statutory rights conferred on a conservancy authority by section 56 of the Act of 1847 were not available against owners who had abandoned a wreck, and therefore ceased to be owners, before the expenses of raising the wreck were incurred, but that where a vessel, through negligence, has sunk in such a position as to cause an obstruction in a navigable channel maintained by a conservancy authority, that authority, independently of any statutory rights it may have, has a right at common law to recover as damages the reasonable cost of removing the obstruction.

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[18] [1894] A.C. 508; 10 T.L.R. 551.

[19] [1940] P. 1.

In the present case Willmer J.,[21] after rejecting the contention of the defendants to the effect that even if, contrary to their submission, the expenses in question would otherwise have been a proper subject of limitation, the telephone conversations and letters to which I have referred constituted a contract under which the plaintiffs agreed to pay them in full, continued[22]: "The "question to be decided, therefore, comes to this. Assuming that "the canal company, in raising the wreck of the *Stonedale No. 1*, "were, in the contemplation of both parties, acting under the "statutory powers conferred by section 32 of the Act of 1936, "as I am satisfied they were, are they entitled to recover the "expenses in full, notwithstanding that the sinking of the "*Stonedale No. 1* was caused by the improper navigation of the "plaintiffs' vessels? The defendants say that the improper "navigation of the plaintiffs' vessels is an irrelevant considera-"tion; for it was the plaintiffs' failure to remove the obstruction,

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[20] [1928] 2 K.B. 159.
[21] [1953] 1 W.L.R. 1253.
[22] Ibid.

"and not the negligent making of the obstruction, which was the "cause of the expenses being incurred by the canal company, and "which therefore forms the basis of their claim. The plaintiffs, "on the other hand, contend that since the decision of the Court "of Appeal in *Dee Conservancy Board* v. *McConnell*[23] it is "impossible to escape the conclusion that the cost of removing "this wreck was a loss or damage resulting directly from the "improper navigation of the plaintiffs' vessels, and, as such, "clearly within the words of section 1 of the Merchant Shipping "Act, 1900. They contend, furthermore, that, having regard to "the express words of section 3 of the Act, it can make no "difference whatsoever whether their liability is regarded as "arising at common law or (as the defendants say) under the "defendants' private Act. For myself, I confess that I find "the logic of the plaintiffs' argument difficult to resist, and if "the matter were res integra I should be disposed to hold that the "expenses here in question were (*a*) within the words 'loss or "'damage . . . caused to property or rights,' and (*b*) were caused "'by reason of the improper navigation or management' of the "plaintiffs' vessels. But I find myself quite unable to distinguish "*The Millie*,[24] which is a direct decision to the contrary. As "Langton J. himself said in that case, the point to be decided is "'a nicely balanced one.' I bear in mind that in any limitation "suit a heavy burden is upon the plaintiffs to establish their right "to relief. In this case they must, in my view, accept the added "burden of satisfying the court that *The Millie*[24] was wrongly "decided. I find myself unable to say that the plaintiffs have "discharged this burden to my satisfaction. If *The Millie*[24] was "indeed wrongly decided, I think that it is for the Court of "Appeal, and not for me, to say so. For myself, I do not feel "able to do other than follow the decision of Langton J. and to "hold that the plaintiffs have not made out their claim to limit "their liability as against the canal company. In my judgment, "therefore, the action fails so far as the canal company is "concerned."

Mr. Carpmael, for the plaintiffs, has argued before us that *The Millie*[24] was wrongly decided and should be overruled, and consequently that the judgment of Willmer J., in which he merely followed *The Millie*[24] against his own inclination, should be reversed on grounds which can, I think, fairly be summarized as follows: (i) Section 32 of the Act of 1936 does not expressly or by

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[23] [1928] 2 K.B. 159.

[24] [1940] P. 1.

C. A.
1954

THE STONEDALE No. 1.

Jenkins L.J.

necessary implication exclude the application of section 1 of the Act of 1900 or section 9 of the Act of 1897; (ii) therefore one or other of those limitation provisions must be applied to the liability here in question, provided it is a liability of a kind to which that provision extends; (iii) inasmuch as the sinking of the barge and consequent obstruction of the canal was due to the negligence of the plaintiffs' servants, the defendants could, quite apart from section 32, have recovered from the plaintiffs at common law the damages suffered by the defendants in consequence of that negligence, including the reasonable cost of raising and removing the barge: *Dee Conservancy Board* v. *McConnell*[25]; *The Ella.*[26] Those damages would clearly have been limited by virtue of section 1 of the Act of 1900, for the plaintiffs' liability to pay them would have been a liability to damages in respect of "loss "or damage" to the defendants' rights as statutory proprietors of the canal, which must necessarily include a right to the unobstructed use of the canal. (iv) Thus where a vessel is sunk or stranded in the canal through the negligence of those in charge of her, the sum recoverable by the defendants as expenses is nothing more nor less than a sum of damages recoverable at common law independently of section 32 of the Act of 1936, and that section in such a case merely provides a statutory method of recovering the amount without altering its essential character as a sum of damages. It follows that where the sinking or stranding is due to the negligence of those in charge of the vessel not involving the actual fault or privity of the owners, the limitation provided for by section 1 of the Act of 1900 applies to the liability under section 32 just as it would apply to a claim for the like amount as damages at common law. In other words, where the sinking or stranding occurs in circumstances giving rise to a common law claim, section 32 does not displace the limitation provided for by the Act of 1900, which applies just as it was held in *The Countess*[27] to be applicable notwithstanding the special provision made by section 94 of the Mersey Dock Acts Consolidation Act, 1858, for the recovery of damage to dock property "through the misconduct, negligence, or default of the master of "any vessel, or any other person on board of any vessel." It is true that the Act of 1900 was later in date than the section considered in *The Countess*,[27] while it is earlier in date than section 32 of the Act of 1936, but this makes no real difference, since

[25] [1928] 2 K.B. 159.

[26] [1915] P. 111; 30 T.L.R. 566.

[27] [1923] A.C. 345.

section 32 does little more than reproduce the substance of enactments which were in force before the passing of the Act of 1900. (v) The fact that a statute imposes an absolute liability on the owners of a vessel irrespective of negligence is no ground for excluding limitation in cases in which the damages claimed are found to be due to improper navigation not involving the actual fault or privity of the owners. For example, the owner of a vessel is answerable under section 74 of the Act of 1847 for damage done by such vessel without any negligence whatever (see *The Mostyn* [28]), yet it can hardly be doubted (though there seems to be no reported decision on the point) that an owner is entitled to limit his liability under that section by virtue of section 1 of the Act of 1900 if in the particular case the damage is shown to have been caused by improper navigation not involving his actual fault or privity: see section 3 of the Act of 1900, which expressly provides that the Act is to apply "whether the liability arises at "common law or under any general or private Act of Parliament "and notwithstanding anything contained in such Act." (vi) In any case, section 9 of the Act of 1897 provides for limitation of liability in respect of injury or damage caused to the relevant portion of the canal or the banks, locks or works comprised in such portion, not confining the limitation provided for to cases of improper navigation, but merely requiring that there should be no actual fault or privity on the part of the owners of the vessel concerned. The language of section 9 is wide enough to include injury or damage in the shape of obstruction of the canal, and its effect is to confer a right to limitation with respect to all claims for expenses under section 32 of the Act of 1936 irrespective of negligence.

These arguments are not without force, but I have come to the conclusion that they should be rejected for the following reasons. As to section 9 of the Act of 1897, it is to be observed that in *The Towerfield*,[29] the words "any damage done by such vessel . . . "to the harbour, dock, or pier, or the quays or works connected "therewith" in section 74 of the Act of 1847 were held by Lords Porter,[30] Normand,[30] Morton of Henryton [30] and Radcliffe [30] to be confined to physical damage, to what Lord Normand called "the opera manufacta of the undertaking," and not to include damages for loss of the use of the harbour in question while the channel was blocked. We were invited by Mr. Carpmael to treat the passages expressing this view as merely obiter. It is not clear to me that they were, as the point appears to have been argued, but obiter or not, I think that it would be wrong for this court, in face of these four concurrent opinions, to place a different construction on the closely similar language of section 9 of the Act of 1897. In my view, therefore, we should follow Willmer J. in treating section 9 as confined to physical injury or damage to the canal and the works comprised in it and not as extending to the cost of removing a sunken or stranded vessel which has done no physical damage, but has merely become by reason of its sinking or stranding an obstruction to the canal.

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[28] [1928] A.C. 57; 44 T.L.R. 179.

[29] [1951] A.C. 112.

[30] Ibid. 136, 148, 155, 161.

It follows that the plaintiffs, in order to succeed, must bring the case within section 1 of the Act of 1900. That section is confined to liability to damages, and although the range of damages to which it extends includes damages in respect of any loss or damage to property or rights of any kind caused by the improper navigation or management of a vessel, provided that there is no actual fault or privity on the part of the owners, no claim which is not a claim to damages can fall within it. I agree that if a vessel was sunk or stranded in the canal through the negligence of those in charge of her and the defendants brought an action for damages at common law in respect of the obstruction, her owners (provided there was no actual fault or privity on their part) could limit under the Act of 1900. The position may well be the same where a statute (for example, section 74 of the Act of 1847) imposes irrespective of negligence a liability in damages upon the owners of a vessel which does damage to the canal, provided that in the particular case the necessary conditions of improper navigation and absence of actual fault or privity on the part of the owners can be established.

But a close consideration of section 32 of the Act of 1936 leads me to the conclusion that the liability of the owner of a sunk or stranded vessel under that section to pay the expenses incurred by the defendants in and about the raising and removal of the vessel is not a liability to damages at all. The object of the section is to enable the defendants in their own interests and in those of all users of the canal to secure that their navigation is kept clear of obstructions in the shape of sunken, stranded or abandoned vessels and to cause this to be done either by and at the expense of any such vessel or at the option of the owner by the defendants at his expense. In the latter case the expenses incurred by the defendants, so far as not met by a sale of the salvaged vessel, are, according to the terms of the section, expressed to be recoverable not as damages, but as a civil debt.

It should be borne in mind that when the defendants put into operation their powers under section 32 in any given case the vessel concerned, unless and until it is raised, is from the owner's point of view a total loss, as well as being from the defendants' point of view an undesirable obstruction to their canal. The operation of raising the vessel may, or may not, be beneficial to the owner according to the value of the vessel when raised as compared with the cost of raising it. If the cost of raising the vessel exceeds its value when raised the effect of the section (whether the owner does the work himself or leaves it to be done by the defendants at his expense) is to put the owner so much more out of pocket than he would have been if the vessel had been left where it was. On the other hand, if the cost of raising the vessel is less than its value when raised the owner will have profited by the transaction. I find difficulty in seeing how the statutory obligation placed by section 32 upon the owner concerned either to recover his own vessel himself at his own expense or to pay the defendants their expenses of recovering it, with results that may, or may not, be to his financial advantage according to the circumstances of the particular case, can be classed as a liability to pay damages.

The option conferred on the owner by subsection (3) of section 32 is, to my mind, important. Under that subsection, before dealing with the vessel themselves, the defendants, except in case of emergency, must give the owner 24 hours' notice of their intention to act, whereupon the owner has 12 hours within which to choose whether he will do the work himself or leave it to be done by the defendants at his own expense. If he does the work himself the expenses he incurs are clearly not damages. He pays no damages to the defendants or anyone else. He simply pays his own expenses incurred by himself in recovering his own property; it may very well be to his own financial advantage. If he elects to leave the raising to be done by the defendants at his expense, and the defendants proceed to do it, the expenses incurred by the defendants in so doing, which the owner becomes liable to pay, do not, to my mind, assume any different character. They are still expenses of raising the owner's own vessel which, upon his electing not to do and pay for the work himself, the defendants have by statutory authority incurred on his behalf. Supposing the vessel when raised is worth £10,000 and the expenses incurred by the defendants in raising it amount to £2,000, the owner will have profited by the good offices of the defendants to the extent of £8,000, either by the recovery of the vessel itself or (in the event of a sale, which the owner is entitled under subsection (2) to demand) in the shape of the surplus proceeds of sale. Bearing in mind that at the time the section is brought into operation the vessel is lying useless in the canal, I find it impossible to hold that the expenses payable by the owner in such a case are in the nature of damages sustained by the defendants, and not merely expenses incurred by the defendants on the owner's behalf in recovering his own property for his own benefit. If that is so when the raising benefits the owner, I fail to see how the liability for the expenses incurred can alter its character and become a liability in damages because in the result the costs of raising in the particular case turn out to exceed the value of the vessel when raised, a circumstance which, in the event of unforeseen difficulties occurring in the raising operation, or the damage sustained by the vessel being found on raising and surveying her to be greater than was anticipated, might well not emerge until a late stage in the operation, perhaps not until after its completion. Accordingly, section 32 does not, in my opinion, impose a liability in damages to which limitation can be applied.

I would be disposed to go further and hold that the terms of section 32 are so far inconsistent with limitation of liability as to exclude it by necessary implication. Even if the views expressed above as to the effect of the section do not command universal approval, it is, at all events, plain that the section is not concerned with damages at large, but in each case with specifically defined expenditure, namely, the expenses actually incurred in and about the raising of a particular vessel. That in itself sets a limit to the liability in question. Then the section makes it clear that the liability thus defined and limited is to be met in full by the owner, for subsection (2) provides that the defendants may recover *all* expenses incurred. The same subsection empowers the defendants to sell the vessel, and reimburse themselves for any such expenses, and hold any surplus in trust for the owner. In the event of that power being exercised, and of a surplus resulting, I find it difficult to see how limitation could be applied so as to entitle the owner to recover from the defendants any part of the expenses so deducted by them. Furthermore, there is the option conferred on the owner to do the work himself at his own expense. Mr. Carpmael does not contend that on exercising the option the owner can claim any limitation on the expenses he himself incurs. If limitation applies in the event of the owner electing to leave the raising to the defendants, while the owner has to pay the expenses in full if he elects to do the work himself, the option becomes no more than a trap, and no prudent owner would ever exercise it. I think that the option affords strong ground for holding that limitation is by necessary implication excluded, owing to the absurd results which would otherwise ensue. Finally, a limitation would mean either that the owner could limit even in a case in which the value of the vessel when raised exceeded the full cost of raising by no matter how much, or else that limitation would fall to be applied or excluded according to the financial result of the operation. The former alternative, which would enable an owner to recover a valuable vessel at the expense of the defendants to the extent of the difference between the full and the limited cost of raising it, I reject as repugnant to justice and common sense, while the latter alternative seems to me impossible.

If there was no other ground for holding section 1 of the Act of 1900 inapplicable, I do not think that it would be right to hold it excluded merely on the ground that its application would produce the inequitable result of placing an owner whose vessel has been sunk or stranded by the negligence of his servants in a better position than one who has suffered a similar casualty without any negligence at all on the part of those in charge of her; for this seems to be a necessary product of limitation in all cases where an unqualified liability irrespective of negligence is imposed by statute on the owner of a vessel doing damage—for instance, in cases under section 74 of the Act of 1847, to which it seems probable that section 1 of the Act of 1900 applies, given the necessary element of improper navigation not involving the actual fault or privity of the owner. But I am fortified in the view I have formed of the effect of section 32 by the circumstance that it does avoid this inequity.

As already mentioned, Langton J. founded his decision in *The Millie* [31] partly upon a doubt whether there was any direct causal connexion between the improper navigation of the *Millie*, to which her sinking was due, and the expenses of raising her claimed under section 32 of the Act of 1936. I doubt whether this line of reasoning can be maintained consistently with *Dee Conservancy Board* v. *McConnell*,[32] which, as I have said, does not appear to have been cited to Langton J., and I prefer to base my decision on the ground that, for the reasons I have endeavoured to state, I do not think that expenses incurred in raising a vessel under section 32 are in the nature of damages.

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[31] [1940] P. 1.

[32] [1928] 2 K.B. 159.

Apart from *The Millie* [31] we were not referred to any reported case in which a claim for expenses under section 56 of the Act of 1847 or under section 32 of the Act of 1936 has been held to be subject to limitation under section 1 of the Act of 1900. Nor, on the other hand, were we referred to any report of any actual decision the other way. But it is, I think, significant that in *The Countess*,[33] both at first instance and in this court, and in the House of Lords, it was on all hands taken for granted that the expenses of raising the offending vessel under section 7 of the Mersey Dock and Harbour Board Act, 1912, were recoverable by the dock board in full without any question of limitation. Thus Atkin L.J. said [34]: "The limitation suit does not in any "affect the defendants' rights to these expenses, and the sole "question for determination is whether the statutory conditions "have been complied with." I am also impressed by the passage to which my Lord has referred from the judgment of Scott L.J. in *The Brabo*,[35] where that great authority on this branch of the law took it as well known that limitation did not apply to the costs of wreck removal under statutory powers such as those discussed in the present case. Accordingly, for the reasons I have endeavoured to state, while I cannot wholly accept the grounds upon which Langton J.'s decision in *The Millie* [36] was based, I think that the conclusion to which he came was the right one.

I have only to add that I agree with Willmer J. in thinking that the letters and telephone conversations mentioned earlier in this judgment cannot fairly be held to amount to a contract excluding any right to limitation which the plaintiffs would otherwise have had. But as, in my view, they had no such right, my finding in favour of the plaintiffs on this issue cannot affect the result, which in my judgment is that this appeal fails and should be dismissed.

Hodson L.J. I have had the opportunity of reading in advance the judgments which have been delivered by Singleton and

[33] [1921] P. 279; [1922] P. 41; [1923] A.C. 345.

[34] [1922] P. 60.

[35] [1947] 2 All E.R. 363, 370.

[36] [1940] P. 1.

C. A.

1954

THE STONEDALE No. 1.

Jenkins L.JJ., and I agree with their conclusions and with their reasons, and have nothing to add.

Appeal dismissed.

Solicitors: *Batesons & Co., Liverpool; Hill, Dickinson & Co., Liverpool.*

H. G.

[DURHAM CONSISTORY COURT.]

In re ST. MARY, TYNE DOCK.

1953
Dec. 21, 22.
1954
Feb. 1;
Mar. 12.

Hylton-Foster Ch.

Ecclesiastical Law—Faculty—Ornaments—Removal of illegal ornaments —Reservation of the sacrament in a tabernacle or aumbry—Authority of the bishop—Sanctuary gong and bells—Altar lights and other candle-holders—Incense, thurible and incense boat—Confessional table and chair—Crucifixes and processional cross—Second and third holy tables—Stations of the Cross—Holy water stoup, cruet of holy oil and humoral veil—Statue of the Blessed Virgin Mary with the Child Jesus.

At the hearing of the issues arising from three petitions for faculties, the legality of the ornaments and furnishings of a church was considered:—

Held, (i) that a tabernacle on a reredos behind the principal holy table was an illegal ornament, not authorized by the Ornaments Rubric, and must be removed from the church, together with the ciborium: *Capel St. Mary, Suffolk* v. *Packard* [1927] P. 289 applied;

(ii) that the aumbry in the form of a small cupboard with a shelf inset in the north wall of the sanctuary was not an ornament; and that, since the bishop had authorized reservation of the sacrament in that church, the aumbry could continue to be used for that purpose: *In re the Parish of Altofts* (unreported, 1941), *St. Mary the Virgin, Swanley* (unreported, 1946), and *In re the Parish Church of West Ilsley* (unreported, 1952) followed;

(iii) that the sanctuary gong and the two sanctuary bells were illegal and must be removed: *Capel St. Mary, Suffolk* v. *Packard* (supra) applied;

(iv) as to the various candle-holders, that the use of more than two lights on the principal holy table was not necessarily illegal: *In re St. Saviour's, Walthamstow* [1951] P. 147; 66 T.L.R. (Pt. 2) 666; [1950] 2 All E.R. 812 applied; that the portable candle-holders used ceremonially must be removed: *Capel St. Mary, Suffolk* v.

[Reported by G. H. WOOLVERIDGE, Esq., Barrister-at-Law.]

Packard (supra) applied; that the remainder, including a paschal candle, being objects susceptible of lawful use and sanctioned by the bishop, could remain under a confirmatory faculty until further order;

(v) applying *Capel St. Mary, Suffolk* v. *Packard* (supra) that the ceremonial use of incense was illegal; but that as the bishop had sanctioned some use of incense, the thurible and incense boat, being susceptible of lawful use, could remain;

(vi) that the confessional table and chair could remain, there being no evidence of compulsory confession or of superstitious reverence;

(vii) that those crucifixes which were decorations could be retained; but that the crucifix attached to the processional cross must be removed;

(viii) that the second holy table introduced by faculty and standing in the north aisle could remain;

(ix) that the court had power to authorize a third holy table in a proper case: *St. Margaret's, Toxteth Park* (1924) 40 T.L.R. 687 followed;

(x) that the Stations of the Cross could be introduced under a faculty granted until further order: *In re St. Peter, St. Helier, Morden, and In re St. Olave, Mitcham* [1951] P. 303; [1951] 1 T.L.R. 1033; [1951] 2 All E.R. 53 followed;

(xi) that the holy water stoup in the vestry came within the principle "de minimis non curat lex"; that no illegality attached to the cruet of holy oil; that the humoral veil was not a matter for the faculty jurisdiction; but the court would not make any order with regard to these three objects;

(xii) that the proposed statue of the Blessed Virgin Mary with the Child Jesus which it was proposed to erect near the holy table in the north aisle, though unobjectionable on aesthetic grounds, would if introduced into the church cause offence to many parishioners and would tend to keep alive unhappy discord; and a faculty for its introduction would accordingly be declined.

Petitions for faculties.

By a petition dated February 27, 1953, the incumbent, the churchwardens and 58 other petitioners sought a faculty to introduce into the Church of St. Mary, Tyne Dock, a statue of the Child Jesus with His Mother the Blessed Virgin Mary. By a petition dated May 26, 1953, Elsie Collingwood and 10 others, members of the parochial church council and parishioners, sought a faculty for the removal of 30 articles, on the grounds, as to all but one, that they had been illegally introduced without a faculty; as to some, that they were illegal; and as to all, that they were or were likely to be the objects of superstitious reverence. The incumbent and churchwardens by a further petition of July 10, 1953, sought, as to some of the articles referred to in Miss Collingwood's petition, a faculty for their introduction and as to other articles, some referred to in Miss Collingwood's petition and others not, a faculty to introduce or a confirmatory faculty. After citation there followed in each case an act on petition in opposition.

The 30 articles the subject of Miss Collingwood's petition were listed in a schedule to the petition as follows:—The First Part, articles alleged to be illegal and introduced without a faculty—(a) 1 tabernacle on the communion table surmounted by a crucifix; (b) 1 ciborium of brass in the tabernacle; (c) 1 paschal candle-holder; (d) 1 humoral veil; (e) 1 holy water stoup on the east wall of the vestry; (f) 1 water sprinkler; (g) 1 confessional table and chair with crucifix; (h) 1 thurible; (i) 1 incense boat; (j) 1 sanctuary gong of brass with a beater; (k) 2 small sanctuary bells of brass; (l) 1 sanctuary lamp suspended in front of the communion table; (m) 1 sanctuary lamp of glass hanging outside the aumbry on the north wall of the sanctuary; (n) 1 cruet of holy oil.

The Second Part, articles alleged to have been illegally introduced without a faculty—(o) 14 Stations of the Cross hung in the nave during Holy Week; (p) 6 candle-holders on the communion table; (q) 2 candle-holders on the credence; (r) 1 crucifix on the south wall of the sanctuary; (s) figure on the processional cross; (t) 1 crucifix hanging on a pillar above the pulpit; (u) 1 crucifix on the small holy table at the east end of the north aisle; (v) 1 crucifix on the east window sill of the vestry; (w) 1 crucifix in the church hall; (x) 1 small holy table at the east end of the south aisle; (y) 2 standard candle-holders in the vicinity of the font; (z) 2 oak candle-holders placed on the font; (aa) 2 portable candle-holders used by acolytes and placed on the steps of the communion table; (bb) 2 covered portable candle-holders for outside use; (cc) 1 aumbry on the north wall of the sanctuary.

The Third Part, an article likely to become the object of superstitious use—(dd) 1 small holy table at the east end of the north aisle. Paragraph 3 of the petition alleged that all the above articles were likely to be the objects of superstitious use and superstitious reverence and regard.

It was agreed between the parties that the issues arising on the three petitions should be tried together; and at the request of the parties the Chancellor inspected the church and such of the articles in dispute as were there.

E. Garth Moore and *G. H. Woolveridge* for the incumbent and churchwardens. St. Mary, Tyne Dock, has been for many years a High Church and the services conducted there have the sanction of the Bishop of Durham. A faculty is requested for the introduction of the statue until further order only; images are not illegal per se, the question is whether there is any danger of superstitious use.

The argument in favour of reservation in a tabernacle can be summarized as follows: (i) Reservation is not doctrinally obnoxious; see the Archbishops' Opinions of 1900. (ii) The alleged illegality of reservation in a tabernacle is based upon the rubrics in the Book of Common Prayer and upon the Thirty-Nine Articles. It is submitted, however, that reservation is not expressly forbidden by the prayer book rubrics or by the Thirty-Nine Articles, which are aimed at irreverence. (iii) Even if reservation is not in accordance with the prayer book, it may be sanctioned by "lawful authority," namely, by the bishop. In *Gore-Booth* v. *Bishop of Manchester* [1] there was no episcopal sanction; in *Bishop of Oxford* v. *Henly* [2] there was again no episcopal sanction, the suit being a criminal prosecution in respect of reservation. These two cases, which were not faculty cases, may therefore be distinguished from the present. (iv) The Dean of Arches in *Bishop of Oxford* v. *Henly* [2] admitted that pre-Reformation practice was to reserve the blessed sacrament in a tabernacle or hanging pyx over the altar; the rubric that "Chancels shall remain as in times past" has the force of law and effect must be given to it. (v) The earlier decisions against reservation where the practice was contrary to lawful authority are now affected by the usage which has gradually grown up in favour of reservation; there have been a number of recent decisions (unreported) allowing reservation in an aumbry. (vi) If reservation is legal in an aumbry it must also be legal in a tabernacle. In *Capel St. Mary, Suffolk* v. *Packard* [3] the legality of a tabernacle was not properly argued, nor was there any episcopal authority for reservation. (vii) It is possible that a tabernacle does not exist as a separate thing; it is either a cupboard in the wall, or part of the holy table itself, or part of the reredos attached to the fabric of the church. A holy table is not an ornament: see *Roffe-Silvester* v. *King*,[4] and a tabernacle attached to an altar and part of it is not an ornament. (viii) There is no decision binding in the Northern Province against reservation. (ix) The grant of a faculty is in any case discretionary, and in the exercise of its discretion the court should not accede to the objectors' prayer where the result would be to change a long-established practice.

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[1] [1920] 2 K.B. 412; 36 T.L.R. 464.

[2] [1907] P. 88; 23 T.L.R. 152.

[3] [1927] P. 289.

[4] [1939] P. 64; 55 T.L.R. 33; [1938] 4 All E.R. 147.

As to the paschal candle-holder, a faculty is desired in order to bring it into the church in connexion with services which have been sanctioned by the bishop as lawful authority. The paschal candle-holder may be in the church for a lawful, non-ceremonial purpose, and is no more objectionable than a Christmas tree or crib.

The use of the gong and sanctuary bells is said to be an unlawful addition to ceremony. It is submitted, however, that the use of these articles is similar to the playing of the organ or the singing of hymns or the "agnus dei" during the reception of the elements.

H. S. Ruttle for the opponents. Reservation in the Church of England is illegal; the practice is not permitted either by the Articles of Religion or by the rubrics in the Book of Common Prayer. The diocesan bishop is not "lawful authority" in this connexion and cannot legalize what is illegal or contrary to the rubrics. "Lawful authority" means Parliament or the Queen-in-Council. This is the only view compatible with uniformity. Usage cannot be relied upon as indicative of what the law is; in any event, 50 years is not sufficiently long. The tabernacle and articles associated with it are outside what is authorized by the Ornaments Rubric and are articles used in connexion with an illegal ceremony.

In so far as a candle is used in the performance of services it is an ornament; candles do not appear in the Ornaments Rubric and in this connexion are therefore illegal. The ceremonial use of light is illegal. The use of more than two lights on the holy table is exceptional and the discretion to allow more than two should be used sparingly.

Regarding the proposed statue, it is important to consider the general churchmanship of the incumbent, which is relevant to the likelihood of superstitious usage. The general background is also important when the court is exercising its discretion in any matter; the opponents are members of the church and are entitled to have the services conducted as laid down by law.

E. Garth Moore replied.

[The following cases were also referred to: *Martin* v.

Mackonochie [5]; *Bishop Sumner* v. *Wix* [6]; *Elphinstone* v. *Purchas* [7]; *Sheppard* v. *Bennett (Second Appeal)* [8]; *Ridsdale* v. *Clifton* [9]; *Read* v. *Bishop of Lincoln* [10]; *In re St. Mark's, Marylebone Road* [11]; *Kensit* v. *St. Ethelburga, Bishopsgate Within* [12]; *Davey* v. *Hinde* [13]; *Markham* v. *Shirebrook Overseers* [14]; *St. John the Evangelist, Clevedon* v. *All Having Interest* [15]; *Vincent* v. *St. Magnus the Martyr, etc.*[16]; *In re St. Saviour's, Hampstead* [17]; *In re St. Peter, St. Helier, Morden, and In re St. Olave, Mitcham* [18]; *In re St. Saviour's, Walthamstow* [19]; *In re the Parish of Altofts* [1941, Vaisey Ch. (unreported)]; *St. Mary the Virgin, Swanley* [1946, Ashworth Ch. (unreported)]; *In re the Parish Church of West Ilsley* [1952, Guillum Scott Ch. (unreported)].]

Cur. adv. vult.

March 12, 1954. Hylton-Foster Ch., reading his judgment, stated the facts and continued: As objection appears to be taken to certain services and in particular to the Holy Week services conducted by the present incumbent I think it right to say that it is no part of the duty of this court in the exercise of its faculty jurisdiction to put a stop to any services. For that purpose other proceedings are appropriate. If the court has heard evidence as to those services it has done so only for the help which such evidence can give when issues as to the likelihood of superstitious reverence are raised and for its bearing upon the use made of the articles in dispute.

I should like to thank counsel for the very great assistance which they have given to the court and to say that all the witnesses called have given their evidence with frankness and moderation and that I am sure that all were actuated only by a wish to do their duty to their church.

With regard to the articles referred to in the pleadings which are already in the church, it is admitted (save as to two as to which faculties are claimed and as to a further 14 as to which it is claimed that no faculty is required) that they have been illegally introduced without a faculty. Accordingly, it is right to record that the present incumbent can be held responsible for the introduction of only four as the remainder were introduced before his incumbency began in May, 1945.

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[5] (1868) L.R. 2 P.C. 365.

[6] (1870) L.R. 3 A. & E. 58.

[7] Ibid. 66.

[8] (1871) L.R. 4 P.C. 371.

[9] (1877) 2 P.D. 276.

[10] [1892] A.C. 644; 8 T.L.R. 763.

[11] [1898] P. 114.

[12] [1900] P. 80; 15 T.L.R. 549.

[13] [1901] P. 95.

[14] [1906] P. 239; sub nom. *In re Holy Trinity, Shirebrook*, 22 T.L.R. 278.

[15] [1909] P. 6.

[16] [1925] P. 1; sub nom. *St. Magnus the Martyr, London Bridge*, 41 T.L.R. 3.

[17] [1932] P. 134.

[18] [1951] P. 303; [1951] 1 T.L.R. 1033; [1951] 2 All E.R. 53.

[19] [1951] P. 147; 66 T.L.R. (Pt. 2) 666; [1950] 2 All E.R. 812.

I turn to the matters in dispute. For convenience I refer to the incumbent and his co-petitioners as " the petitioners " and to the parties opposing the petitions of the incumbent as " the " opponents." To help to identify the several articles I use the lettering given to them in Miss Collingwood's petition.

First as to the tabernacle (a). The opponents want it removed. The petitioners oppose its removal but have not asked for a confirmatory faculty. It has been the practice in this church for many years to reserve the blessed sacrament. At one period the sacred elements were reserved in a cupboard or aumbry in the north wall of the sanctuary. In or about 1947, a tabernacle was installed and since its installation it has been habitually used for reservation in place of the aumbry.

This tabernacle was introduced without a faculty. It consists of a steel safe about 18 inches high and 12 inches wide, is situated in the centre of the back of and above the principal holy table and is built into the reredos. It is surmounted by a small crucifix and a sanctuary lamp is suspended and kept burning above it. Its appearance can be seen in the photographs put in. The bishop by letter dated April 6, 1953, has sanctioned the practice of reservation in the church and intimated that he does not disapprove of reservation in the tabernacle.

It has been repeatedly held that such a tabernacle is an illegal ornament. In *Kensit* v. *St. Ethelburga, Bishopsgate Within* [1] there is a dictum of Dr. Tristam that it is clearly an illegal church ornament. In *Davey* v. *Hinde* [2] he ordered the removal of two tabernacles objected to on the ground, inter alia, that they were illegal ornaments not authorized by the Ornaments Rubric. Sir Lewis Dibdin, Dean of Arches, in *Capel St. Mary* v. *Packard* [3] held of a tabernacle over the altar used for the reservation of the sacrament that it was an illegal ornament. To the like effect is the decision of Ashworth Ch. in *St. Mary the Virgin, Swanley.*[4]

None of these authorities is strictly binding upon this court, but the court ought to follow them unless sufficient reasons appear

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[1] [1900] P. 80.

[2] [1901] P. 95, 121.

[3] [1927] P. 289.

[4] (Unreported, Dec. 19, 1946.)

1953–1954

St. Mary, Tyne Dock, *In re.*

Hylton-Foster Ch.

for not doing so. Counsel was unable to cite any authority where a faculty for the introduction or retention of a tabernacle had been granted in a contested suit. It was submitted that a tabernacle is not an ornament but merely an aumbry with central or eastern position or part of the furnishings of the holy table. This contention appears to me to be inconsistent with authority and I am unable to accept it. I hold also that on the evidence of the incumbent about the use which he makes of it during services that the tabernacle in this church is an ornament which is used " pro quocumque apparatu seu instrumento."

No evidence was called with a view to establishing that tabernacles were ornaments of the church in general use in 1549. Attention was directed to Lempriere's Compendium of the Canon Law, 1903, at p. 139, where it is stated that " In the thirteenth " century the English custom was to reserve in a tabernacle." I do not doubt that reservation of the blessed sacrament in a hanging pyx or occasionally in a tabernacle over the altar was the practice in English churches prior to the Reformation; but that practice is not an indication of what happened thereafter, nor is it safe to assume that the meaning of the word tabernacle at this period is restricted to its meaning at the present time. I was also referred to Walcott's Westminster where (at p. 58) there is an extract from the churchwardens' accounts recording a payment in 1541 to Roger Weston " for taking down of our Ladye's Taber- " nacle at Rouncyval and for the setting up thereof in the Trinity " Isle in St. Margaret of Westminster," and to the references to tabernacles in the Surrey Inventories (at pp. 126, 131, 132 and 133). In view of the pre-Reformation practice it is not surprising that tabernacles are found in the Inventories.

I do not find in these references material sufficient to cause me not to follow the authorities referred to. I hold, accordingly, that the tabernacle is an illegal ornament not authorized by the Ornaments Rubric. If it is not, then the bishop's sanction cannot save it, for consent of the bishop cannot render an illegal church ornament legal.

It is submitted on the authority of *Roffe-Silvester* v. *King*[5] that the court has a discretion to refuse to authorize the removal of even an illegal ornament, but upon a consideration of the whole of the circumstances and in particular that the tabernacle was illegally introduced and that I am satisfied upon the evidence that reservation in the tabernacle is objected to by a substantial body

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[5] [1939] P. 64.

1953–1954

ST. MARY, TYNE DOCK, *In re.*

Hylton-Foster Ch.

of parishioners, I am not, in the exercise of my discretion, prepared to refuse a faculty for its removal. Accordingly, it must be included in the faculty for removal, and with it the ciborium (b). The sanctuary lamp (l) in its present situation will be inappropriate. In view of my conclusion as to the aumbry I do not authorize its removal from the church.

As to the aumbry (cc), different considerations in my opinion apply. In the first place, it is merely a small cupboard with a shelf inset in the north wall of the sanctuary, and I hold that an aumbry of this kind is not an ornament. Secondly, the bishop has by the letter referred to authorized reservation in this church. In *In re the Parish of Altofts*[6] Vaisey Ch., in the Consistory Court of Wakefield, said: "If I am told that the sacred elements "are to be reserved in a church with the sanction or at any rate "not contrary to the directions or express wishes of the bishop "(that is a fact to which I am bound to pay attention) I regard "it as my duty as chancellor of the diocese and as such custodian "of all churches in it to see that such reasonable steps are taken "to secure the sacred elements which are in point of fact to be "reserved in the church from anything in the nature of desecration or profanation. If I were to refuse this application it "might well be that the vicar was driven to house the consecrated "bread and wine in some unworthy place as a cupboard in the "vestry and in my view I am fully justified in permitting the "construction of this aumbry . . . and direct that it may continue "to be part of the furnishing and fitting out of this church until "further order."

In *St. Mary the Virgin, Swanley*,[7] Ashworth Ch. said: " . . . "it is well known that in many dioceses faculties are issued for "aumbries and if the practice is contrary to the law it is most "desirable that the true position in regard to them should be "established. . . . This question was raised but not fully "answered in *Roffe-Silvester* v. *King*.[8] The Deputy Dean of "Arches refused to give any ruling in respect of cases where the "sacrament was reserved without the sanction of the bishop, but "he went on to state that his observations related to the submissions made on the facts of that case and were not directed in "any way to other cases when the sacrament is reserved with the "approval of the bishop and application is made to a consistory

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[6] (Unreported, July 4, 1941.)

[7] (Unreported.)

[8] [1939] P. 64.

" court for provision to be made for its proper and decent reception. He said this[9]: 'I see no ambiguity whatever in the " 'chancellor's judgment. He has made it clear that his judg" 'ment does not preclude the vicar at some future time from " 'applying to him for a faculty authorizing an aumbry, and, " 'while it will be open to any person interested to oppose that " 'application, it cannot be on the ground that by reason of the " 'judgment in this case the matter is res judicata. Neither the " 'chancellor nor this court has prejudged any such application, " 'nor do I intend to express or indicate any view as to how such " 'an application, if it is made, should be entertained.' Although " the deputy dean left the question open I regard the absence of " any condemnation of aumbries as important, and it is at least " true to say that there is nothing in that case which prevents " me from granting the faculty now sought in respect of the " aumbry. Indeed, my reading of the deputy dean's words is " that by implication they justify the course which I propose to " take."

These two judgments were followed by Guillum Scott Ch. in the Consistory Court of Oxford in *In re the Parish Church of West Ilsley.*[10]

In view of these authorities and of the fact that the bishop has here sanctioned reservation, I think it right in the circumstances of this case to refuse a faculty for the removal of the aumbry and to grant a confirmatory faculty for its retention until further order. It may be that some adaptation of the existing aumbry will be necessary, and the incumbent spoke of a need to consider another situation. I say nothing to prejudice in any way the consideration of any application to the court in this connexion should one be made.

For the petitioners it was argued that reservation is lawful in this church on the ground that the practice is forbidden neither by the Book of Common Prayer nor the Thirty-Nine Articles and has in this case been expressly authorized by lawful authority, namely, the bishop. For the opponents it was contended that the practice of reservation is wholly illegal in the Church of England; that in that church there is no jus liturgicum and that the bishop has no power to set aside or alter what is prescribed in the Book of Common Prayer. In deference to the careful arguments of counsel I record their contentions, but as I have reached a conclusion as to the proper orders with regard to the tabernacle and the aumbry it is unnecessary for the purpose of this judgment to decide the issue raised. In the circumstances I am unable to suppose that it would assist either the parties to this litigation or the diocese that I should express any view about it and I do not.

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[9] [1939] P. 92.

[10] (Unreported.)

As to the sanctuary gong (j) and the two sanctuary bells (k), it is true that they have been in the church for at least 25 years; but the opponents are entitled to have the law applied to them. They are illegal ornaments: *Elphinstone* v. *Purchas*,[11] followed in principle in *St. John the Evangelist, Clevedon* v. *All Having Interest*[12]; *Capel St. Mary* v. *Packard*[13]; and must be included in the faculty for removal.

I come now to the candle-holders. The six candle-holders (p) are in use on the principal holy table and there are indications that they have been there for more than 30 years. Of the witnesses called for the opponents only two made special mention of them and two expressly disclaimed any objection to them. The use of more than two candles is not necessarily illegal: see *In re St. Saviour's, Walthamstow*[14] and *In re St. George's, Southall*.[15] Each case stands on its own circumstances and I grant in my discretion a confirmatory faculty for their retention. This conclusion should not be regarded as an encouragement to like applications in future or as a precedent necessarily to be followed in other cases. The traditional and recognized use in the Church of England being two altar lights only, any application for the introduction of more than two must be considered with extreme care.

As to the remaining candle-holders (c) (q) (y) (z) (aa) and (bb), it was submitted that the ceremonial use of lights is illegal, a proposition abundantly supported by authority: *Bishop Sumner* v. *Wix*[16]; *Elphinstone* v. *Purchas*[17] and *Capel St. Mary* v. *Packard*.[18] But, as was said in *Martin* v. *Mackonochie*,[19] there is a clear and obvious distinction between the presence in the church of things inert and unused and active use of the same things as a part of the administration of a sacrament or of a ceremony. The candle-holders (c) (q) (y) and (z) are all objects susceptible of lawful use and I am bound to notice that the bishop has by his letter of July 20, 1953, sanctioned the use of (c). In the circumstances I grant in relation to (c) a faculty in the terms sought in

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[11] (1870) L.R. 3 A. & E. 66.

[12] [1909] P. 6.

[13] [1927] P. 289.

[14] [1951] P. 147.

[15] [1952] 1 All E.R. 323.

[16] (1870) L.R. 3 A. & E. 58.

[17] Ibid. 66.

[18] [1927] P. 289.

[19] (1868) L.R. 2 P.C. 365.

1953–1954

St. Mary, Tyne Dock, *In re.*

Hylton-Foster Ch.

paragraph 2 (1) of the petition dated July 10, 1953, and in relation to (q) (y) and (z) a confirmatory faculty, in each case until further order.

As to the portable candle-holders (aa) and (bb), it is pleaded by amendment that the set (aa) is illegal in itself, and there is undisputed evidence of ceremonial use. Both the sets (aa) and (bb) were unlawfully introduced without a faculty. There is no suggestion that they are wanted for light or for other than ceremonial use. They must be included in the faculty for removal.

From the evidence it is clear that incense has been used ceremonially. The ceremonial use of incense is illegal (*Bishop Sumner* v. *Wix* [20]; *Capel St. Mary* v. *Packard* [21] and *Roffe-Silvester* v. *King* [22]), but the thurible (h) and the incense boat (i) are susceptible of lawful use and the bishop by his letter of July 20, 1953, has sanctioned some use of incense. In the circumstances, I decline a faculty for their removal.

It is conceded that there is no evidence of compulsory confession or of superstitious reverence in connexion with the confessional table or chair (g). They were admittedly introduced without a faculty, but in view of the submission and apology made by the petitioners I am sure that a confirmatory faculty until further order may properly be granted.

The crucifixes, one (part of (a)) on the tabernacle, one (part of (g)) and those lettered (t) (u) and (v) are decorations. Upon the whole of the evidence I do not think that any of them have been or are in the circumstances of this case likely to be abused by superstitious reverence and I grant a confirmatory faculty for their retention until further order. The opponents want the crucifix (v) on the south wall of the sanctuary to be removed and the petitioners do not object to its removal. It will be included in the faculty for removal. It is common ground that the crucifix (w) is outside the faculty jurisdiction and no order is made about it.

The figure (s) has been attached without a faculty to a processional cross kept in the chancel and makes of it a processional crucifix. No attempt was made to contend that such an ornament is legal. The figure must be included in the faculty for removal, which will be complied with by leaving in the church the processional cross without the figure attached.

There is nothing to support the allegation that the holy table in the north aisle (dd) is or is likely to become an object of superstitious reverence. It was introduced pursuant to faculty and I decline a faculty for its removal.

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[20] L.R. 3 A. & E. 58.

[21] [1927] P. 289.

[22] [1939] P. 64.

The history of the holy table (x) in the south aisle is not satisfactory. A faculty was granted in 1951 pursuant to a petition for the introduction of a holy table expressly to replace that then standing in the north aisle. No application was made for a third holy table, nor was any communication made to the court as to what should be done with the holy table replaced by the new one introduced pursuant to faculty. The incumbent has used the holy table so replaced as a third holy table either in the south aisle or in the nave. His explanation is that he did not know how else reverently to dispose of it as the faculty was silent as to its disposal. The petitioners ask for a confirmatory faculty in the terms of sub-paragraph (9) of paragraph 2 of the petition dated July 10, 1953.

There is nothing to support the allegation that this holy table has been or is likely to be an object of superstitious reverence. There is evidence that it does serve a useful purpose as a portable holy table, in particular at children's services as there is not space enough for all the children to be conveniently placed in the north aisle. The practice has, I think, changed in degree since a faculty was refused in *St. Michael, Bromley*,[23] and it is within the power of a Consistory Court to authorize a third holy table in a proper case: see *St. Margaret's, Toxteth Park*.[24] After a full consideration of all the circumstances I think it is right to authorize it in this case on the ground of practical convenience. Accordingly I grant a faculty until further order for its introduction to the east end of the south aisle and for its removal thence from time to time to the nave and for the placing on it as may be required all or any of the following ornaments, namely, two candlesticks and a brass cross.

The next matter is a set of 14 pictorial representations known as Stations of the Cross (o). It was submitted that such a set is intrinsically illegal. That contention was considered and rejected by Garth Moore Ch. in *In re St. Peter, St. Helier, Morden, and In re St. Olave, Mitcham*.[25] His judgment is not binding on this court, but I respectfully agree with his reasons and his conclusion and follow it. In any event the plea is not open to the opponents on their pleading.

I have thus to consider if in the circumstances of this case it is right to have some or all of the representations removed, and in particular those without scriptural authority. The set of representations has been in use in this church during Holy Week for more than a quarter of a century. Only two of the witnesses called for the opponents specifically objected to them. I have heard evidence of the devotions conducted before them and it does not lead me to the conclusion that they are or are likely to become objects of superstitious reverence. I note that the incumbent has undertaken to comply with the directions of the bishop in the matter and that the bishop by his letter of January 16, 1954, (Exhibit 9) has asked him to "omit the Hail Mary which you have "hitherto said with the people at two or three of the stations." I do not wish to burden this inordinately long judgment with a review of all the matters which have influenced me. Not without hesitation, upon a consideration of all the circumstances I think that all the 14 representations may safely be allowed to be introduced during Holy Week subject to the safeguard, against any change occurring in the future, of a grant until further order only. Accordingly I grant a faculty in the terms sought in sub-paragraph (2) of paragraph 2 of the petition dated July 10, 1953.

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[23] (1908) 25 T.L.R. 95.

[24] (1924) 40 T.L.R. 687.

[25] [1951] P. 303.

The holy water stoup (e) is not in the church but in the vestry and is a very small and inconspicuously situated object. The incumbent said that he kept it full solely in case a visiting clergyman should wish to use it. A witness called for the opponents with a long experience of the church had never known it to be used. The principle "de minimis" should, I think, be applied. I am not satisfied that any illegality attaches to the cruet of holy oil (n). The humoral veil (d) is not a matter for the faculty jurisdiction. No order is made as to these three objects.

I turn to the proposed statue. It is unobjectionable in my view upon aesthetic grounds. On the other hand, it is large, being about 3 feet in height. The figure of the Blessed Virgin Mary wears a species of crown. In position the statue would be on a level with and about a yard from the top of the holy table in the north aisle. Young children worship in the church. The parochial magazine for December, 1953, gives notice of a "children's mass" at 9 a.m. on Thursdays. The children—they are the juniors of the Church Day School—range in age from 7½ to 12 years. The "Hail Mary" is taught in Sunday School and there is evidence that the Girl Guides and the Brownies (listed among the church organizations) say it.

The suggestion is that the statue would be likely to become an object of superstitious reverence. I do not decide this matter because whatever arguments may be advanced on this ground I should not think it right in the exercise of the court's discretion to allow the introduction of the statue. With five crucifixes authorized and some banners I cannot find that in the absence of the statue the petitioners will be unreasonably starved of visual aids to devotion. Signatures were collected to a petition against the proposal. Without full knowledge of the circumstances in which the several signatories came to sign I do not attach any importance to the petition itself. I am, however, quite satisfied by the evidence called before me that a substantial body of church-going parishioners sincerely and ardently object to its introduction, and especially in the case of an article purely decorative in character such objections are important: *In re St. Mark's, Wimbledon.*[26] This is not a case of a mere possibility that the statue, if introduced, might cause offence to someone attending the church. All the witnesses called for the opponents were emphatic in their objection. The proposal has, I fear, become so much a matter of controversy that the statue, if introduced, would be a cause of offence to many for whom the church is provided and would tend to keep alive that unhappy discord which all must wish to have brought to an end as soon as possible. Accordingly I decline a faculty for the introduction of the statue.

Finally, there are the various items numbered 13 to 28 inclusive in the petition dated July 10, 1953. Some are insignificant objects as to which a faculty might not be required, but in response to the petitioners' desire to regularize the ornaments of their church and in the absence of opposition I am willing to deal with them all and to grant a confirmatory faculty as prayed.

The faculty for removal will follow the design of that in *Davey* v. *Hinde*[27] and will allow abundant time for all to be done in orderly and seemly fashion.

In the result the opposing parties have each succeeded in part and failed in part. It is clearly to the advantage of all to avoid, if possible, a complicated taxation related to specific issues and, subject to any submissions of counsel, I should propose to make no order as to costs save that the parties respectively should each pay into the registry one-half of all the court fees incurred in the case.

Faculties decreed accordingly.

Solicitors: *Trollope & Winckworth; Ralph W. T. Lubbock & Co., Newcastle-upon-Tyne.*

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[26] [1908] P. 167.

[27] [1901] P. 95.

1954
May 26.

Davies J.

THOMSON *v.* THOMSON AND WHITMEE.

Husband and Wife—Divorce—Variation of settlement—Variation to reduce income tax payable—Power of Divorce Court—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 25.

Settlement—Marriage settlement. Revenue—Tax avoidance scheme.

On the dissolution of a marriage on the ground of the wife's adultery the husband sought to vary certain marriage settlements by extinguishing the interests of the wife as if she were dead. He sought, further, to vary one of the settlements so as to provide for the income and accumulation of the fund, which would otherwise go direct to the two children of the marriage, to be dealt with by trustees for maintenance, education, and also for the purchase of an endowment policy. It was stated that one of the objects of the variation sought was to reduce the amount of tax which would otherwise be payable:—

Held, that in view of the power given to the Divorce Division by section 25 of the Matrimonial Causes Act, 1950, to vary the trusts of a marriage settlement, the court should not be deterred from exercising that power in a proper case although one of the results would be a reduction in the amount of tax otherwise payable to the Crown.

Chapman v. *Chapman* [1954] A.C. 429; [1954] 1 All E.R. 798 distinguished.

APPLICATION for confirmation of a registrar's report as to variation of settlements.

The parties were married in 1933 and there were two children of the marriage, a girl born in 1935 and a boy in 1939.

By an ante-nuptial settlement dated October 30, 1933, a policy of insurance was effected on the husband's life for £11,000 with profits and assigned by him to the trustees of the settlement. The following trusts were declared: (1) a trust to pay the income of the settled fund to the wife during her life; (2) after the death of the wife a trust of the capital of the settled fund in favour of such of the children or remoter issue of the marriage as the husband and the wife should by deed jointly appoint and in default of appointment as the survivor should by deed, will or codicil appoint; (3) in default of appointment a trust for the children; (4) an ulterior trust in the husband's favour. Power was conferred by the settlement upon the husband to withdraw a specified fraction of the settled fund and to settle it upon an after-taken wife and issue of such after-taken wife.

On March 13, 1945, a post-nuptial settlement was made by effecting an insurance policy on the husband's life assuring for an annual premium of £339 3s. 7d. until March, 1969, the payment to him and to the wife or the survivor as trustee of £10,000 without profits on the husband's death. It was provided by certain special provisions that the policy was issued (1) for the benefit of the wife if she survived the husband, (2) if she should die in his lifetime, (*a*) for the benefit of the two children of the marriage if both should survive him or for the surviving child, (*b*) if neither child survived him for the benefit of any other child of the husband's by the wife or any other wife, or (*c*) if no child survived him for the benefit of the estates of the two children of the marriage.

A second post-nuptial settlement was made on March 27, 1945, by effecting another insurance policy on the husband's life assuring for an annual premium of £695 until March, 1969, the payment to him and the wife or the survivor as trustee of £20,000 without profits on the husband's death subject to identical special conditions. Certain variations reducing the premiums were made in April, 1953, in the terms of both the above policies, the sums assured being reduced to £7,733 and £15,468.

On July 19, 1945, a post-nuptial declaration of trust was made by the husband and the Westminster Bank Ld. whereby, after recitals of the payment by the husband to the bank of £100,000 and his desire to make provision for the wife and the two children of the marriage, it was declared and agreed that the husband and the bank should hold the capital sum upon certain trusts for the benefit of the wife and two children, the trust fund being divided into two moieties.

On November 26, 1953, the husband was granted a decree nisi of divorce on the ground of adultery; that decree was made absolute on January 11, 1954.

The son's position under the declaration of trust at the date of the present application was stated to be as follows: The income of his share of the first moiety was held on protective trusts for his benefit during his life and (on the assumption that the wife's life interest in the second moiety was extinguished as if she were dead), he would be entitled during his life to the income of a special fund (part of the second moiety) and the income of his share of the balance of the second moiety would be held on protective trusts for his benefit during his life. The daughter's position was stated to be that the income of her share of the first moiety was held on protective trusts for her benefit during her life and (upon a similar assumption) the income of her share of the balance of the second moiety would be held on protective trusts for her benefit during her life.

It was submitted by the husband in his affidavit on this application that " I have been advised by counsel that as a consequence of the provisions of chapter II of Part XVIII of the " Income Tax Act, 1952 (s. 397 et seq.) in their application to " the trusts of the declaration of trust as now existing there is a " serious risk that any income paid to or for the benefit of [the " girl] or [the boy] while she or he is an infant and unmarried " will be treated as my income for income tax (and surtax) purposes, with the result that neither child will be entitled to claim " any relief for tax in respect of personal allowances, nor (if " income not required for maintenance is accumulated) will either " child be able to claim repayment of tax under section 228 of the " said Act, inasmuch as each child has a vested interest in the " income, and his or her title to any accumulations will not be " contingent on his or her attaining a specified age or marrying. " That as appears from the particulars set out in [an exhibit] " the estimated gross income of each moiety of the said trust " fund is approximately £2,334. On the assumption last aforesaid " and as the declaration of trust now stands, the gross income " payable to or applicable for the benefit of [the girl] (as primary " beneficiary under the protective trusts) will be about £1,867 " (viz., £1,167 half of the income of the first moiety plus about " £700 half of the income of the balance of the second moiety " after setting up [the special fund]) and the gross income payable to or applicable for the benefit of [the boy] will be about " £2,900 (viz., £1,867, plus about £930, income of [the special " fund]).

" That gross incomes of the amount stated exceed what will " be reasonably required for maintenance or education and a considerable surplus will remain, but for the reasons given in [the " paragraph above] [the two children] will not enjoy advantages " in respect of allowances and repayment of tax which might be " enjoyed if variations rather of form than of substance were " made in the declaration of trust.

" That in the circumstances aforesaid it is respectfully submitted that it will be for the benefit of each of the two children " that a trust should be created for the accumulation of income " not required for maintenance and education and that the title " of each child to any accumulations should be made contingent " on the attainment of the age of 21 years or (in the case of " [the girl]) earlier marriage.

1954

THOMSON v. THOMSON AND WHITMEE.

"That as appears from [the previous paragraph but one] the "gross income to which [the boy] is entitled considerably exceeds "that to which his sister is entitled. I consider it expedient and "in the interest of [the boy] that during his minority power should "be given to the trustees to apply a proportion of his income "in effecting and maintaining a policy of insurance on his life "so that when he attains 21 part of the surplus income which "he would otherwise have received in cash will be represented "by a paid-up endowment policy maturing on his attaining the "age of 30."

The wife brought no funds into settlement and the husband applied to have her interests in the four settlements extinguished as if she were dead. The effect of treating the wife as having died in the lifetime of the children, without further variation, would, as stated above, have been to give the two children an immediate and substantial benefit. The husband's application in respect of the declaration of trust of July, 1945, was as follows:—

"That the declaration of trust dated July 19, 1945, be varied, "as follows, namely:—

"(1) By extinguishing all the interest of [the wife] in the "one moiety (in the declaration of trust defined as 'the second "'moiety') of the trust fund . . . so that, with regard to the said "second moiety the declaration of trust may in all respects be "read as if [the wife] were dead and had died in the lifetime "of . . . the two children of the marriage named in the declaration "of trust.

"(2) By varying the trusts . . . to the extent and in manner "following (namely):—

"(i) By conferring on the settlor and Westminster Bank Ld. "and other the trustees or trustee for the time being of the "declaration of trust (therein and hereinafter called 'the "'trustees') a power during the minority of [the son] to apply "at the discretion of the trustees a sum or sums (not exceeding "in all in any one year £800) out of the net annual income (after "deduction of tax) arising from all or any of the son's share "of the first moiety the son's share of the balance of the second "moiety and [the special fund] for or towards the maintenance "education or benefit of the son;

"(ii) By conferring on the trustees power during the minority "of the son to apply at the discretion of the trustees a further "sum or sums (not exceeding in all in any one year £800) out "of the said net annual income arising from both or either of "the son's share of the first moiety and the son's share of the "balance of the second moiety in effecting in some office of repute "and maintaining during the minority of the son a policy on the "life of the son to mature on his attainment of the age of 30 years "or earlier death and not to be subject to the payment of any "premiums after his attainment of the age of 21 years, but "otherwise to contain such terms and conditions as to the "trustees shall seem fit such policy or the moneys assured there- "by to be held by the trustees on whichever of the following trusts "shall in the event be or become applicable (namely):—(*a*) If "the son shall attain the age of 21 years the trustees shall hold "the said policy and the full benefit thereof in trust for the son "absolutely but (*b*) If the son shall die under the age of 21 years "the trustees shall hold the said policy and all moneys assured "thereby or payable thereunder upon the trusts and subject to "the powers and provisions in the declaration of trust declared "and contained concerning the son's share of the first moiety and "so as to form one fund therewith for all purposes (including any "hotchpot provision)).

"(iii) By imposing on the trustees trusts under which during "the minority of the son the trustees shall accumulate all the "residue of the said net annual income arising from the son's "share of the first moiety the son's share of the balance of the "second moiety and [the special fund] (in this subclause "together called 'the son's trust premises') in the way of com- "pound interest by investing the same and the resulting income "thereof in authorized investments and shall hold those accumu- "lations as follows (namely) if the son attains the age of 21 years "the trustees shall hold the accumulations in trust for the son "absolutely but if the son shall not attain the age of 21 years "the trustees shall hold the accumulations as an accretion to the "capital of that part or those parts of the son's trust premises "from which such accumulations arose or respectively arose and "as one fund for all purposes (including any hotchpot provision) "with that part or those parts of the son's trust premises.

"(3) By varying the trusts by clauses 7 and 11 of the declara- "tion of trust declared concerning the portions of the said trust "fund which are therein respectively defined as 'the daughter's "'share of the first moiety' and 'the daughter's share of the "'balance of the second moiety' to the extent and in manner "following (namely):—

"(i) By conferring on the trustees a power during the minority "and spinsterhood of the daughter to apply at the discretion

" of the trustees a sum or sums (not exceeding in all in any one " year £800) out of the net annual income (after deduction of tax) " arising from both or either of the daughter's share of the first " moiety and the daughter's share of the balance of the second " moiety for or towards the maintenance education or benefit of " the daughter.

" (ii) By imposing on the trustees trusts under which during " the minority and spinsterhood of the daughter the trustees shall " accumulate all the residue of the said net annual income arising " from the daughter's share of the first moiety and the daughter's " share of the balance of the second moiety (in this subclause " together called 'the daughter's trust premises') in the way of " compound interest by investing the same and the resulting " income thereof in authorized investments and shall hold those " accumulations as follows (namely) if the daughter attains the " age of 21 years or marries under that age the trustees shall hold " the accumulations in trust for the daughter absolutely and " so that the receipt of the daughter after marriage and though " still an infant shall be a good discharge but if the daughter " shall not attain the age of 21 years or marry under that age " the trustees shall hold the accumulations as an accretion to the " capital of that part or those parts of the daughter's trust " premises from which such accumulations arose or respectively " arose and as one fund for all purposes (including any hotchpot " provision) with that part or those parts of the daughter's trust " premises.

The husband further applied that the co-respondent should pay his costs of the application, together with those of the trustees and the representative of the children.

The variations sought were not opposed by the wife, but the co-respondent resisted the application for the costs incurred on behalf of the children. The trustees had no representation to make to the court and took no part in the proceedings.

MR. REGISTRAR RUSSELL, in his report, said: " It is freely " admitted by counsel for the husband that the variations sought " in [the paragraphs quoted supra] of the notice are for the " avoidance of possible tax. All counsel, and particularly counsel " for the wife, invited me to consider the recent decision of the " House of Lords in *Chapman* v. *Chapman* [1]; but in my submission the principles enunciated in that case do not bear on the

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[1] [1954] A.C. 429; [1954] 1 All E.R. 798.

1954

THOMSON
v.
THOMSON
AND
WHITMEE.

"case now under report. The main question in the *Chapman* "case [1] was whether the Chancery Division of the High Court had "jurisdiction, being, if any, an inherent jurisdiction, to sanction "the rearrangement of the trusts of a settlement for no other "purpose than to secure an adventitious benefit (in that case the "avoidance of certain estate duty). It was held that the Chancery Division had no such jurisdiction and the principles on "which the jurisdiction in the Chancery Division is based were "propounded. In my submission the *Chapman* case [1] is quite "unrelated to the jurisdiction in the Divorce Division, where "the jurisdiction is statutory, being based on section 25 of the "Matrimonial Causes Act, 1950, by which 'The court may . . . "'inquire into the existence of ante-nuptial or post-nuptial settle-"'ments . . . and may make such orders with reference to the "'application of the whole or any part of the property settled "'either for the benefit of the children of the marriage or of the "'parties to the marriage, as the court thinks fit . . .' In my "submission the court is expressly given jurisdiction to secure, "and to order, adventitious benefit, and does so with the main "object of making proper provision for the children and, if "necessary, for the injured spouse. Nor, in my submission, is "the jurisdiction in any way diminished by the fact that, had "the marriage continued, the Chancery Division might not have "been able to sanction a variation; for the jurisdiction of the "Divorce Division under section 25 of the Act is expressly based "on the disruption of the marriage. Whether or not it is right "that the jurisdiction should be exercised for the avoidance of "tax would seem to be another matter; but, in my submission, "when children are concerned, the jurisdiction, whether in variation of settlement or in the ordering of maintenance, is exercised "so as to adjust or redeploy the financial assets available, so far "as can reasonably be done, to the best advantage of the children "of the disrupted marriage; and in my submission, where the "untimely disruption of the marriage would adversely affect the "children on taxation the court would not hesitate to make any "reasonable variation of a settlement for the preservation of "their interests. I therefore accept the submissions of counsel "for the husband based on the affidavit, and I submit:—

"1. That all four settlements be varied as asked in the notice "of application . . ."

"2. That the co-respondent has been responsible for the costs

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[1] [1954] A.C. 429.

"of this litigation including the costs incurred on behalf of the "children and that therefore he be ordered to pay the costs of "the [husband] and the children as between party and party; "and, all parties consenting, that the costs of the [husband] and "the children and all trustees as between solicitor and own client, "less the amount of costs received from the co-respondent, be "raised and paid out of the capital of the first moiety of the trust "fund subject to the declaration of trust.

"In this case two junior counsel were instructed on behalf "of the husband, one of them being Chancery counsel, and both "being, in this rather unusual case, of much assistance. "Accordingly I certify for all counsel including two junior counsel "for the husband petitioner.

"In view of the decision in *Chapman* v. *Chapman* [2] I recom- "mend that this case be heard in open court."

A. R. Ellis for the wife and co-respondent, and speaking as amicus curiae, referred to *Chapman* v. *Chapman* [2] as a decision which might prevent the making of the order in view of its effect upon taxation.

Donaldson Loudoun for the children. Although the proposed variations would result in a benefit to the two children by a saving of income tax, it might appear that the court is bound by *Chapman* v. *Chapman*,[2] and is unable to make the order upon which the parties are agreed. It is submitted, however, that the terms of section 25 of the Matrimonial Causes Act, 1950,[3] under which this application is made, are such as to give this court, when considering marriage settlements after a decree of divorce, a discretion which remains unfettered, and that *Chapman* v. *Chapman* [2] is to be distinguished as being a decision upon a different type of variation sought in another Division.

Victor Russell and *H. A. Rose* for the husband concurred in this submission.

The parties were agreed upon the variations sought.

DAVIES J. stated the facts and continued: It is frankly pointed out that one of the objects of this proposed variation is to reduce the amount of tax that would otherwise be payable on the income of the settlement. I have no information before me as to the amount of the husband's income apart from the money comprised in the settlement, but I suppose one may hazard a guess that it is not inconsiderable. The danger that was apprehended was, first, that the substantial sum of money which would otherwise be the income of the two children of the marriage would, since the fund came from the husband, their father, have to be aggregated with his income for the purposes of income tax and surtax, and, secondly, that they would not be able, on attaining their majority, to reclaim the payment of the tax paid in respect of what is their share because, as was pointed out to me, if their income is deemed to be their father's income, then they cannot reclaim the tax. Obviously, therefore, quite apart from the fact that they could not reclaim the tax, the tax payable would be at a very much higher rate than would otherwise apply.

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[2] [1954] A.C. 429.

[3] Matrimonial Causes Act, 1950, s. 25: "The court may, after pro- "nouncing a decree for divorce or for "nullity of marriage, inquire into the "existence of ante-nuptial or post- "nuptial settlements made on the "parties whose marriage is the sub- "ject of the decree, and may make "such orders with reference to the "application of the whole or any part "of the property settled either for "the benefit of the children of the "marriage or of the parties to the "marriage, as the court thinks fit. ". . ."

There is no dispute that the proposed rearrangement is wholly beneficial to the two children. But my attention has been properly called to *Chapman* v. *Chapman*,[1] a recent decision of the House of Lords, where it was decided that the Chancery Division had no inherent jurisdiction to interfere with and modify trusts for the purpose of reducing the incidence of estate duty. That case was drawn to the attention of the registrar, and he has set out in his report his reasons for coming to the conclusion that section 25 of the Matrimonial Causes Act, 1950, expressly gives to this Division the power of altering and interfering with the trusts of a settlement, a power which the House of Lords decided did not exist in the Chancery Division.

I fully agree with and adopt everything that the registrar said. At one time, owing to the fact that there was no opposition to the variation which is asked for except as to costs, I thought that it might be desirable for me to invite the Queen's Proctor to argue this case and put before the court such considerations as he thought fit. But it seems to me that the position is so clear that I do not think that it is necessary to adopt that course.

The House of Lords decided that the Chancery Division has no inherent power to alter the trusts of a settlement. But this Division, by section 25 of the Matrimonial Causes Act, 1950, has the express power to do so. [His Lordship read the section and continued:] The only passages in the speeches in the House of Lords to which, I think, it is necessary to call attention, in order to point the difference which, in my view, plainly exists between the powers of the Chancery Division and of this Division, are as follows. Lord Simonds L.C., who was speaking all the time of the Chancery Division, said[2]: "It is the function of the court "to execute a trust, to see that the trustees do their duty and to "protect them if they do it, to direct them if they are in doubt "and, if they do wrong, to penalise them. It is not the function "of the court to alter a trust because alteration is thought to "be advantageous to an infant beneficiary. It was, I thought, "significant that learned counsel was driven to the admission that "since the benefit of the infant was the test, the court had the "power, though in its discretion it might not use it, to override "the wishes of a living and expostulating settlor, if it assumed "to know better than he what was beneficial for the infant." But it is common knowledge that this court does exercise the power of overriding the wishes of a living and expostulating settlor if it thinks fit to do so. There is no doubt about that; it constantly happens.

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[1] [1954] A.C. 429; [1954] 1 All E.R. 798.

Lord Morton of Henryton propounded the first question which their Lordships had to consider in these words[3]: "My Lords, "the first question which arises is solely one of jurisdiction, and "may be stated thus: Had Harman J. jurisdiction to destroy "the trusts contained in clause 3 of the 1944 settlement and the "similar trusts created by clause 4 of the 1950 settlement, if "he came to the conclusion that the elimination of these trusts "would result in benefit to the infant beneficiaries and to any "after-born beneficiaries?" Lord Morton answered that question in the negative in relation to the Chancery Division. It seems to me that the answer to that question in this Division must plainly be: "Yes, by virtue of the provisions of section 25."

Therefore, for these and the other reasons so clearly stated by the registrar, I have come to the conclusion that this court has the power, in contradistinction to the Chancery Division, which it is asked to exercise in the present case.

There is only one other question: Is this court to hesitate to exercise the power by reason of the fact that one of the incidents of the exercise of the power will be a reduction in the amount of tax which would otherwise be payable to the Crown, consequent on treating the wife as having died? It seems to me that it would be absolutely wrong that this court, if it has the power to resettle these funds, should be deterred from exercising that power on

[2] [1954] A.C. 429, 446.

[3] Ibid. 449.

1954

THOMSON v. THOMSON AND WHITMEE.

Davies J.

some ground of public policy of this kind. The proposed variation will preserve for the benefit of the beneficiaries some of the funds which would otherwise be paid away in tax; and I cannot see that the express power given to the court by section 25 ought to be abandoned for that consideration. Therefore, I think that the registrar's report on that part of the case ought to be confirmed.

As to costs, Mr. Ellis, appearing for the co-respondent, submitted that it was unfair that his client should have to pay the costs of this variation. Here is a large sum of money, he said, and the resettlement or variation of the settlement is entirely for the benefit of the children, and will result to some extent in avoidance of taxation. I can see no reason for distinguishing this case from any other case. Consequently, I confirm the registrar's report in every respect. The report covers all the costs.

Registrar's report confirmed.

Solicitors: *Lewis & Lewis and Gisborne & Co. for Hepworth & Chadwick, Leeds; Ellis, Piers & Co.*

J. B. G.

[HAMPSHIRE ASSIZES, WINCHESTER.]

1954
Mar. 22.

Karminski J.

SAPSFORD v. SAPSFORD AND FURTADO.

Husband and Wife—Divorce—Adultery—Meaning of adultery in law—Manual satisfaction.

Manual satisfaction by itself does not amount to adultery.

Allegations of adultery in a husband's petition for divorce were denied by the wife and co-respondent, who admitted, however, that the wife had given manual satisfaction. The health of the co-respondent, a man in his later sixties, was poor, and medical evidence showed that normal intercourse might have been difficult for him:—

Held, that while manual satisfaction would not by itself amount to adultery, and might on occasions have been less strain to the co-respondent than an attempt at full coitus, the nature of the association, and the many opportunities offered for misconduct, had been such that even if a satisfactory coitus had proved impossible, some lesser act of sexual intercourse, amounting in law to adultery, must be inferred.

Dicta in *Rutherford* v. *Richardson* [1923] A.C. 1; 39 T.L.R. 42; *Thompson* (*orse. Hulton*) v. *Thompson* [1939] P. 1; 55 T.L.R. 10; [1938] 4 All E.R. 1, applied on the finding of adultery.

PETITION by husband for dissolution of marriage.

The husband by his petition prayed for a decree of divorce on the ground that the wife had committed adultery with the co-respondent in 1952 and 1953. The wife by her answer denied adultery and prayed for a decree of divorce on the ground of alleged cruelty. The co-respondent denied the charge of adultery and disputed a claim for damages, which was not pursued; but owing to his health he was unable to give evidence either in court or before an examiner. The court accepted medical evidence that if the co-respondent were to give evidence there was a prospect that his health might be so endangered that the result would be fatal. The state of his health at the time of the alleged adultery is considered in the judgment.

The following statement of facts relevant to the issue of adultery is summarized from the judgment; the allegations of cruelty were dismissed and do not call for a report. The case against the wife and the co-respondent was that they had been constantly associating on very friendly and affectionate terms over a period of about a year and a half, and that a letter written by the co-respondent to the wife had been intercepted by the husband in March, 1952, with the result that an inquiry agent was called on to investigate the matter further. The inquiry agent (who died before the hearing and whose report of April 4, 1952, was accepted under the Evidence Act, 1938) saw both the co-respondent and the wife, who denied adultery, although they admitted not only an affectionate association, but also acts of gross indecency between them. They maintained then, and continued so to maintain, that the wife gave manual satisfaction to the co-respondent, or assisted him to masturbate himself, but that no adultery in the ordinary sense of that term had been committed, and certainly that no full act of sexual connexion had taken place between them. In addition to these matters, the husband alleged (and, indeed, it was never really challenged) that the association continued on affectionate terms, that the wife and co-respondent were frequently in each other's company, that affectionate letters passed, that they frequently met, and that the co-respondent gave the wife valuable presents. He also alleged that they committed adultery in the country in a car on January 6, 1953.

The wife and co-respondent first met in about 1950 when the co-respondent was living in or near Wyke Regis, Dorset. The co-respondent, a man then in the later sixties and of independent means, lived in the neighbourhood and called in the ordinary way at the public house at Wyke Regis, of which the husband was the licensee, as a customer. He established himself on friendly terms with the wife, and to a considerably lesser extent with the husband, and he sometimes visited the private quarters over the bars. In the autumn of 1951 the co-respondent moved his home from Wyke Regis to Broadstone, and the friendship between the wife and the co-respondent continued. The co-respondent and wife wrote and telephoned to each other frequently, and there were regular meetings between them. A daughter of the marriage gave evidence (which was accepted) that on one occasion she saw the wife and the co-respondent kiss on the stairs, that on another occasion she went into the sitting room and found her mother on the co-respondent's lap. During the period of this association the co-respondent gave the wife a ring and a fur coat.

In March, 1952, the husband, whose suspicions had been aroused, intercepted a letter and took it to his solicitors. It was of an extremely indelicate nature, and there were clear references in it by the co-respondent to the fact that the wife had given him manual satisfaction on occasions in his car, and passages which might be construed as inviting her on some future occasion to perform the complete act of sexual intercourse with him. It was argued on behalf of the co-respondent that another and more probable interpretation of some of the passages in that letter was that the co-respondent could not have intercourse himself but that he was willing that another man might satisfy her at regular intervals. An inquiry agent was given instructions, and he interviewed the co-respondent on April 2, 1952. After the usual form of caution the co-respondent was asked whether or not he had committed adultery with the wife, and the co-respondent replied: "We have never committed adultery, we have kissed "and cuddled each other and frequented hotels together." When invited to give an explanation as to the contents of the letter the co-respondent said: "Yes, I certainly wrote the letter, but most "of it is rubbish. You understand, don't you?" In a statement he said: "I have kissed and cuddled [the wife] in the car, and "her feelings towards me are very friendly inasmuch that she "has my photograph in her bedroom. . . . Some of the contents "[of the letter] are true as regards affection, the rest is only "filthy rubbish. I have at no time ever committed adultery with

"Mrs. Sapsford. Our friendship has been in existence for about "eighteen months."

On April 3, 1952, the inquiry agent called at the public house at Wyke Regis and saw the co-respondent, and the husband and the wife. The wife, having been cautioned, said: "I will make "a statement, but not admitting adultery with Mr. Furtado," and she added that she loved the co-respondent who had been a real friend to her. The co-respondent then turned to the husband and said: "I am sorry, Bill, to have caused you all this trouble." At the end of that conversation the co-respondent took the wife out to lunch.

The wife and co-respondent continued to see each other until in May, 1952, the wife, who was in poor health, and on very unhappy terms with her husband, went to stay with a friend near London, who gave evidence that during the period that the wife stayed with her in London the co-respondent wrote a number of letters, some to her but more to the wife, and that the letters to the wife were of a very affectionate kind, and that in one of the letters to the witness he said that he loved the wife body and soul and that the association was "not all sex."

The wife was away from home from May, 1952, until about the middle of August, 1952, and she then stayed at home for between six and eight weeks and returned to London in the early part of October, 1952, returning to her home again some time in December, 1952. On January 1, 1953, the husband intercepted another letter written by the co-respondent to the wife, which he resealed in its envelope after taking a copy. He again consulted solicitors, and on January 6, 1953, with an inquiry agent and an assistant, watched at a meeting place in Weymouth which was referred to in the letter. The wife met the co-respondent, they embraced, and got into the co-respondent's car and drove off into the country. The co-respondent's car was later found near the road, and only very partially concealed behind some rhododendron bushes. According to the husband and his witnesses (whose evidence was accepted) the co-respondent and the wife were in the back and cuddling. Not a great deal could be seen of them, and indeed nothing below the waist; and after a time the husband and his agents withdrew, and soon afterwards the wife and co-respondent went back into the front of the car, drove off, and went into a nearby public house. The inquiry agent later interrogated the co-respondent and obtained statements on January 8, 1953, in which the co-respondent confirmed the statement made in April, 1952, and said, in effect, that he admitted

1954

SAPSFORD
v.
SAPSFORD
AND
FURTADO.

that the wife gave him manual satisfaction, but that he did not admit that any attempt at sexual intercourse in the ordinary sense had taken place between them. The wife's evidence was that on two, or at the most three occasions, the last in or about November, 1952, some familiarities took place in the car, and that she touched the co-respondent on or about his private parts at a time when he was touching her breasts. She gave evidence in chief that there had been some touching by her of the co-respondent's person inside his trousers. When pressed about it in cross-examination she limited her admission to saying that her hand had only been on the outside of his trousers and never on the inside, and that such action had been limited to two or three minutes only. She admitted that they had kissed a good deal, and said that the co-respondent's hands were on the outside of her frock and not on her bare breasts. She added that the co-respondent had never suggested sexual intercourse, and that the matter had not been discussed, adding that in her view the co-respondent was too elderly.

Guy Willett for the husband.
Munro Kerr for the wife.
H. J. Phillimore Q.C. and *Giles Best* for the co-respondent.

Reference was made in argument to the following cases: *Thompson (orse. Hulton)* v. *Thompson* [1]; *Rutherford* v. *Richardson* [2]; *Hunt* v. *Hunt* [3]; *Elwes* v. *Elwes*.[4]

KARMINSKI J., after stating the facts and disposing of the issue of cruelty, said:—I am confronted in this case with a position in which in the ordinary case I should almost be bound to infer that adultery had taken place on occasions between these two people, having in mind the nature of the association, the obvious affection, the length of the association and the ample opportunities for gratifying their sexual appetites; but a particular difficulty has arisen having regard to the co-respondent's state of health. The wife suggested that her health might have precluded any sexual activity on her part, but that suggestion was effectively negatived by her own doctor. The co-respondent's case, however, was very different. I have no doubt whatever that on a number of occasions the wife gave manual satisfaction to the co-respondent. That, of course, is an act of sexual familiarity which I suppose on any view of marriage can hardly be thought to be consistent with the duties of a wife towards her own husband; but I have to decide whether the behaviour between the co-respondent and the wife did or did not amount to adultery. Nobody has, I think, yet attempted to define precisely what adultery is, and I do not propose in this case to rush in where much wiser heads have not committed themselves. But I am content to say this, that I do not think that it can be said, nor indeed in the end was it argued, that manual satisfaction can by itself amount to adultery. On the other hand, it has been said many times that an act of adultery need not be such a complete act of intercourse as is required to consummate a marriage, or to use the language of the consistorial courts, there can be adultery without a vera copula.

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[1] [1939] P. 1; 55 T.L.R. 10; [1938] 4 All E.R. 1.

[2] [1923] A.C. 1; 39 T.L.R. 42.

[3] (1856) Dea. & Sw. 121.

[4] (1794) 1 Hag.Con. 269.

There is a good deal of authority that something less than the complete act of sexual intercourse between a man and a woman may amount to adultery. Indeed, that position has arisen on occasions when everything has pointed to an inference of adultery but the woman concerned has proved to be, or at any rate has proved to have the appearance of, a virgo intacta. Such a case was considered in *Rutherford* v. *Richardson*,[1] where there was evidence that the woman named was at all material times a virgin. In the course of his judgment in the House of Lords, Viscount Birkenhead L.C. discussed the question arising from the virginity of the woman named, and said [2]: "The evidence of the "doctor was cautious and guarded. It seems, however, to "establish that there had been no penetration and, in the "doctor's opinion, that the appearance of the organs was such "as he did not think was consistent with an effective attempt at "penetration. Some suggestion was made in argument in this "House that this condition, even though inconsistent with "penetration, was not inconsistent with some lesser act of sexual "gratification. If there were evidence of such an act, it cannot "be doubted that, whatever view may have been taken in past "ages in the Ecclesiastical Courts, a decree based upon adultery "might issue." If I understand those words of the Lord Chancellor, he had in mind that particular case where there had been at any rate an attempt at sexual intercourse, that is by the introduction of the male organ into the female, but for one reason or another that attempt had not fully succeeded. A similar state of affairs was considered by Langton J. in *Thompson (otherwise Hulton)* v. *Thompson*,[3] where the wife had obtained a decree on the ground of the husband's adultery with a young woman; but the King's Proctor had intervened on the production of medical evidence that the woman in question was a virgin. Langton J. came to the conclusion on the evidence, which was briefly that the husband and the woman named had shared a bedroom over quite long periods in the country, that they had committed adultery, although the woman had the signs of virginity. In his judgment, he said[4]: "I am regretfully forced to the conclusion "that the respondent and the intervener in this case have had "mutual intercourse amounting to adultery in law."

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[1] [1923] A.C. 1.

[2] Ibid. 11.

Mutual intercourse, in my view, means that there has to be intercourse in which both the man and the woman play what may be described as their normal role, and that mere manual satisfaction by itself cannot come within the ambit of mutual intercourse. If, therefore, I came to the conclusion that manual satisfaction was all that had taken place here, I should be bound to find, I think, on the authorities, that no adultery had taken place. The older authorities and some of the textbook writers have also discussed the matter, although not, I think, in very clear terms; but the element of intercourse—of copulation—is always present in their definitions. In the well-known textbook by Professeur Esmein, "Le Mariage en Droit Canonique," which was published in France in 1891, he describes adultery in the Latin words "fornicatio carnalis" in discussing in pt. 2 at p. 90 the remedies of the relief given for adultery, and I think that by the use of those words he was contemplating a carnal union between a man and a woman. Adultery, of course, is fornication, but fornication when a party to the fornication is married, and the physical act so far as I know is the same in both adultery and fornication.

Two doctors were called, Dr. Parkinson, who was the doctor, not only to the husband and the wife, but also to the co-respondent while the co-respondent lived at Wyke Regis, and Dr. Beadles, who took over the co-respondent as a patient when he removed to Broadstone in 1951. Dr. Parkinson had the co-respondent as a patient for something like two years. In February, 1950, the co-respondent had symptoms of angina and of high blood pressure, and he was advised by the doctor to restrict his activities and to avoid unnecessary stress such as walking rapidly uphill or excessive weeding in his garden. I do not think that Dr. Parkinson, who was attending a gentleman approaching the seventies, was very much concerned with his patient's sexual activities at that time. Dr. Parkinson said that having seen the co-respondent again, his condition had very much deteriorated since he last saw him in February, 1950, and he agreed with Dr. Beadles that the co-respondent was quite unfit to give evidence in this court. So far as his capacity to indulge in sexual intercourse was concerned, Dr. Parkinson said that in 1950 he thought that the co-respondent would be more capable than now because the attack of pain which might well accompany any such exertion would not be so severe, and he thought on the whole that it would be lesser strain on this man to be masturbated than to indulge in the full coitus. So far as the wife was concerned, Dr. Parkinson saw no reason why she should not then have indulged in sexual intercourse if she wanted to.

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[3] [1938] P. 162.

[4] Ibid. 173.

Dr. Beadles, who is the more recent attendant, was able to go a good deal further. He informed me that amongst other troubles, which include a systolic murmur of the heart and a great many severe attacks of angina, this man has had two coronary thromboses, heart attacks, one at an unascertained date prior to January, 1953, and one more defined as to date in September, 1953; and the doctor took such a serious view of this man's present condition that he asserted without any doubt that in his view it would be very dangerous for him to give evidence in this court. So far as sexual matters are concerned, he took the view that the co-respondent had definitely deteriorated since 1950, and that whereas in 1950 he was probably capable of an emission and possibly capable of an erection, he certainly is not at this time; and he agreed when cross-examined by Mr. Willett, that the co-respondent had deteriorated probably in the last few years. He was shown the letter which I have already discussed, which was written by the co-respondent in March, 1952, and he said that that letter showed clearly that the co-respondent was capable of masturbation or of being masturbated, or of both, and possibly, and no more than possibly, of the full act of intercourse at that time.

The position can be fairly summarized as follows: at the moment and probably for a number of months this man was apparently incapable, and if he had become capable of sexual intercourse he might even have died in the attempt; but going back to the Spring of 1952 and the ensuing months, I am not satisfied, nor indeed, I think, are the doctors, that this man was then incapable. It may be, indeed I think it is very probable, that he

1954

SAPSFORD v. SAPSFORD AND FURTADO.

Karminski J.

would have had great difficulty in achieving a satisfactory coitus, that is coitus satisfactory both to himself and to the woman. I think that it is possible (and this is an hypothesis) that he might have got a partial erection and that he might have proceeded to emission in or about the vagina, a state of affairs which might have been satisfactory to himself and probably very unsatisfactory to the woman. But I have to decide whether there was either a complete or a less successful attempt, or whether there was nothing except a manual satisfaction. The task has been made more difficult by the absence of the co-respondent, the inferences which I should unhesitatingly have drawn in a case of this kind on the one hand and the supposition against those very strong inferences which have been brought into play by the evidence of the doctors; but after giving the matter a good deal of thought I have come to this conclusion, that the co-respondent did commit adultery with the wife. Where he did it it is unnecessary to inquire; quite obviously it was not on January 6, 1953; but there were many and ample opportunities between March, 1952, and January, 1953, when the act could have been achieved. I am not, for the reasons given, bound to estimate the complete success of the act of intercourse; but applying the well-known passage of Lord Birkenhead L.C. to which I have already referred, I have no doubt that if complete penetration were not achieved, some lesser act of sexual intercourse was performed. I prefer to use the phrase used by Langton J. in *Thompson* (*otherwise Hulton*) v. *Thompson*,[5] and find as a fact that the wife committed with the co-respondent and the co-respondent with the wife "such mutual "intercourse amounting in law to adultery." That being so, I find the contents of the petition proved, I reject the prayer in the answer, and I pronounce a decree nisi on the grounds of the respondent's adultery with the co-respondent.

Decree nisi on prayer of petition.

Solicitors: *Williamson, Hill & Co. for Pengilly & Ridge, Weymouth; Vandercom, Stanton & Co.*

J. B. G.

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[5] [1938] P. 162, 173.

EASTLAND v. EASTLAND.

1953
Nov. 12.
1954
Feb. 24.

Karminski J.

Husband and Wife—Divorce—Cruelty—Financial meanness.

Although there may be unhappiness in a marriage the court cannot for that cause alone find cruelty.

The gravamen of a wife's charge of cruelty in an undefended petition for divorce was her husband's failure to make provision for her maintenance, his irresponsibility, and his shiftlessness. The court found that although the wife's health had suffered it was not a case where the husband had desired to injure her:—

Held, that although there had been hardship and unhappiness caused by the husband's grave defects of character as well as by his conduct, his conduct was negative; it was not aimed at the wife, nor directed against her, nor did it in any way impinge upon her; and, therefore, deplorable though it may have been, it fell short of cruelty.

Evans v. *Evans* (1790) 1 Hag.Con. 35, 38; *Kaslefsky* v. *Kaslefsky* [1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398 applied.

Lauder v. *Lauder* [1949] P. 277; [1949] 1 All E.R. 76; *Simpson* v. *Simpson* [1951] P. 320; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955; *Jamieson* v. *Jamieson* [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875 distinguished.

UNDEFENDED PETITION by a wife for divorce on the ground of cruelty.

The parties were married in October, 1940, and there were three children born respectively in 1941, 1945, and 1947. The nature of the allegations, based in the main on matters arising from financial difficulties, is set out in the following paragraphs in the petition, which followed the general charge of cruelty in paragraph 8:

"9. That the respondent has throughout the married life "treated the petitioner with meanness over money matters and "has consistently refused to make her any or any sufficient "allowance for household necessities or for other purposes; that "he has consistently, despite the petitioner's protests, mis-"managed his financial affairs and run into debt, leaving the "petitioner to deal with his creditors, well knowing that his "conduct caused distress and injury to the petitioner's health; "and that he has ignored and neglected the petitioner.

"10. That from the date of the said marriage until the date "hereof the respondent has refused despite the petitioner's "repeated requests to make her any allowance of money for food "or other purposes; when the petitioner protested the respondent "quarrelled with her, told her to order goods on credit, and "refused to pay for the same until the creditors pressed for "payment, well knowing that the petitioner suffered humiliation "and distress by reason thereof.

"11. That in or about March, 1945, some five weeks before "the petitioner gave birth to the said child Diana, the respondent "suddenly announced to the petitioner that he was about to "give up the farm, namely, Foords Farm, Horam in the County "of Sussex, of which he was then tenant; that the respondent "had made no arrangements to provide an alternative home and "when the petitioner begged him to take a house, of which there "were a number vacant locally, he quarrelled with her and "refused to do so, by reason whereof the petitioner, in distress, "was obliged to go to her mother's house, where her said child "Diana was born on May 2, 1945.

"12. That in or about June, 1945, the petitioner persuaded "the respondent to take a tenancy of Plum Tree Cottage, "Marden Thorn in the County of Kent, so that she might have "a home for herself and the said children and asked the respondent to give her an allowance for housekeeping; that the "respondent refused to make the petitioner any allowance and "that from June, 1945, until shortly before the birth in January, "1947, of the said child Michael, the respondent continued in "his refusal to make the petitioner any allowance, despite her "frequent protests; that he avoided his creditors who frequently "throughout the period called at the matrimonial home to "demand payment of their accounts and that he left the petitioner to deal with the said creditors well knowing that his "conduct caused humiliation and distress to the petitioner and "was injuriously affecting her health.

"13. That on a date which the petitioner cannot exactly "specify, shortly before the birth of the said child Michael on "January 12, 1947, the respondent suddenly told the petitioner "that he had spent all his money and was overdrawn at his "bank, whereby the petitioner was obliged in order to pay the "rent of the house to ask her parents for money; the respondent, "though asked by the petitioner to do so, refused to reveal to "the petitioner his earnings or the nature or extent of his debts, "or to give her any allowance, although he well knew that his "refusal was damaging her health.

"14. That during the period from about January, 1947, until "about October, 1952, the respondent ignored and neglected the "petitioner notwithstanding her protests that his conduct as "aforesaid was making her ill.

"15. That on an evening in August, 1951, at Plum Tree "Cottage aforesaid, the petitioner, who was the treasurer of a "local political association, invited the secretary of the said "association to come to her house to sign some cheques; that "the petitioner invited the respondent, who was in bed, to come "down and join her and the said secretary and that the respondent refused; that the petitioner shortly afterwards observed "the respondent spying upon her through a half-open door, and "that the respondent later admitted that he was spying upon "the petitioner in case he could catch her in a compromising "position with the secretary, although he well knew, as was the "fact, that there was not, nor ever had been, any ground for "his suspicions at all.

"16. That by reason of the respondent's conduct as aforesaid "the petitioner became ill, was unable to digest her food or to "sleep properly and was obliged to go to her mother's house "to live in order to regain her health.

"17. That during the year 1952 the respondent ignored and "neglected the petitioner and refused to speak to her except "when it was essential to do so; that he neglected to pay the "rent for the matrimonial home and that he finally, despite the "petitioner's protests, accepted from the landlord a sum of "money to give vacant possession of the said matrimonial home "without having made any arrangements to secure alternative "accommodation for the petitioner and the said children and "well knowing that his action caused the petitioner great "distress. By reason of the respondent's conduct as aforesaid, "the petitioner was obliged again to go to live with her parents.

"18. That by reason of the respondent's cruelty and his acts "of conjugal unkindness hereinbefore set out, the petitioner has "suffered injury to her health and her nerves have been affected."

Karminski J. found that the wife's health had in fact been affected. After hearing the evidence (which was accepted), and the opening submissions on behalf of the wife reported below (which were available to the Queen's Proctor in the transcript of the proceedings), he adjourned the case for the assistance in legal argument of the Queen's Proctor, under the provisions of section 10 (1) of the Matrimonial Causes Act, 1950.

Mark Smith for the wife. The allegations made are such that they may, if accepted, amount in law to cruelty. [He referred to the facts as set out in the judgment of Lord Merriman P. in *Simpson* v. *Simpson*[1] and to the final passage of Karminski J.'s judgment in that case,[2] and submitted that there was a strong similarity between the two cases upon which a finding of cruelty in the present case might be established.]

[KARMINSKI J. Were not the facts rather different? In addition to his meanness, the husband in that case was indifferent to the wife and unkind; and he was also taciturn and selfish. Was there anything against the husband here except his carelessness and indifference to his financial obligations?]

There was his habit of leaving his wife to meet on her own the opprobrium of his creditors. He made his wife obtain food on credit, and only paid his bills when compelled to do so, on two occasions by the arrival of bailiffs.

[KARMINSKI J. But you must prove that the husband treated the wife with cruelty. Suppose that he had committed a criminal offence in financial matters; that, by itself, would not be cruelty. Has there been any case where the only complaint against the husband was that he failed to meet his financial obligations towards his family?]

There appears to be no case directly in point; but there are, it is submitted, two ways of doing an act harmful to a spouse. One is by actually doing something, and the other by failing to do something. [Reference was made to *Simpson* v. *Simpson*.[3]] In the present case the husband clearly knew of the effect of his conduct upon his wife's health.

[KARMINSKI J. referred to *Kaslefsky* v. *Kaslefsky*.[4]]

There is more than a mere neglect here; the husband did not even provide a proper means of living. The intention to injure and inflict misery may be inferred within the meaning of Denning L.J.'s judgment in *Kaslefsky* v. *Kaslefsky*.[5]

[The case was adjourned for legal argument by the Queen's Proctor.]

James Comyn for the Queen's Proctor. The substance of the case is this: the husband was mean over money; he failed to pay his debts; he incurred bills which he did not pay, and he allowed his creditors to pursue the wife. It is submitted that such conduct cannot in law be cruelty. It may amount to wilful neglect, and may be a development of his character, see *Horton* v. *Horton*[6]; but one spouse takes the other "for better or worse."[6]

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[1] [1951] P. 320, 321; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955.

[2] [1951] P. 320, 341–2.

[3] [1951] P. 320.

[4] [1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398.

[5] [1951] P. 38, 46.

What is cruelty is basically a question of fact in regard to the conduct of one spouse towards the other; but there is a concept of ill-treatment, and the words in the statute are "treated with "cruelty." The conduct of which complaint is made must be aimed at, directed to, or impinging upon the other spouse, although intention may be inferred in certain cases. It must be unjustifiable, deliberate, and must cause injury to health. To hold that there has been cruelty in the present case, where the substance of the complaint is that the husband's behaviour was unreasonable and feckless, and confined to his attitude towards money, would be a great extension of the meaning which has been given to the word "cruelty."

The money element was considered in *Jamieson* v. *Jamieson*,[7] but it was not the only factor there, neither was that a suit which had been tried. Nor was it the only factor in *Simpson* v. *Simpson*[8] (an appeal against the finding of justices upon the facts). Those two cases would appear to be the only ones in which financial stress is of any real importance in regard to cruelty. It is clear from *Simpson* v. *Simpson*[8] that there must be conduct "aimed at" the complaining spouse, and that gambling and drunkenness are not of themselves cruelty. Intention may be of decisive importance: see *Cox* v. *Cox*.[9] *Timmins* v. *Timmins*[10] shows that there may be injury to health without cruelty. [Reference was also made to *Kelly* v. *Kelly*[11]; *Russell* v. *Russell*[12]; *King* v. *King*[13]; *Squire* v. *Squire*[14]; *Lauder* v. *Lauder*[15]; *Buchler* v. *Buchler*[16]; *Bater* v. *Bater*[17]; *Richardson* v. *Richardson*[18]; *Usmar* v. *Usmar*[19] and *Beale* v. *Beale*.[20]]

The burden of proof lies upon the wife, and it is not enough to establish conjugal unhappiness. Although the wife may have

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[6] [1940] P. 187, 193; 56 T.L.R. 883; [1940] 3 All E.R. 380.

[7] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

[8] [1951] P. 320.

[9] [1952] 2 T.L.R. 141.

[10] [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187.

[11] (1870) L.R. 2 P. & M. 59.

[12] [1897] A.C. 395; 13 T.L.R. 516.

[13] [1953] A.C. 124; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584.

[14] [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51.

[15] [1949] P. 277; [1949] 1 All E.R. 76.

[16] [1947] P. 25; 63 T.L.R. 100; [1947] 1 All E.R. 319.

[17] [1951] P. 35; 66 T.L.R. (Pt. 2) 589; [1950] 2 All E.R. 458.

[18] [1950] P. 16; 65 T.L.R. 613; [1949] 2 All E.R. 330.

[19] [1949] P. 1; 64 T.L.R. 500.

[20] [1951] P. 48; [1950] 2 All E.R. 539n.

1954

EASTLAND
v.
EASTLAND.

other remedies, and although her health deteriorated during cohabitation, there was no " treatment " of her with cruelty.

Mark Smith in reply. The submissions on behalf of the Queen's Proctor as to the law are not disputed, but it is submitted that the facts are such that cruelty is established. There can be no exhaustive definition of cruelty (see, e.g., *Kelly* v. *Kelly* [21]). Cruelty was not found in *Russell* v. *Russell* [22] because there was no proof of injury, or apprehension of injury, to health: see Lord Merriman P.'s observations in *Lauder* v. *Lauder*.[23] [He referred to the findings of cruelty in *Horton* v. *Horton* [24] and *Squire* v. *Squire*.[25]]

The difference between the present case and *Kaslefsky* v. *Kaslefsky* [26] is that the respondent there was lazy, but was breaking no legal obligations, and there was neither intent to injure nor conduct directed at the complaining spouse. The financial meanness here can be said to have been directed at the wife, who was refused necessaries. Drunkenness, gambling and crime are in a different category, for in those cases the person's interest is in his own pleasure or gain, although he may hurt his spouse in the process. Here the inevitable humiliation and distress arise as a direct result of the husband's conduct, and he was well aware of the effect of that conduct upon the wife.

Intention to injure " may readily be inferred from the natural " consequence of the conduct, especially when the one knows, or " it has been brought to his notice, what the consequences will " be, and nevertheless he does it, careless and indifferent whether " it distresses the other or not ": *per* Denning L.J. in *Kaslefsky* v. *Kaslefsky*.[27] Such an intention may be presumed in the present case. There was a deliberate failure to provide money: it was never suggested that he was unable to do so. [Reference was also made to *Edwards* v. *Edwards* [28] and *Boyd* v. *Boyd*.[29]]

KARMINSKI J. This is a petition by a wife, Margaret Eastland, in which she seeks the dissolution of her marriage with the respondent, John Lorimer Eastland, on the ground of his cruelty. In her petition she also asks for the exercise of the discretion of the court in her favour by reason of her own adultery. The cruelty alleged is entirely non-physical in character, by which I

[21] L.R. 2 P. & M. 59.

[22] [1897] A.C. 395.

[23] [1949] P. 277, 290.

[24] [1940] P. 187.

[25] [1949] P. 51.

[26] [1951] P. 38.

[27] [1951] P. 38, 46.

[28] [1948] P. 268; 64 T.L.R. 61; [1948] 1 All E.R. 157.

[29] [1938] W.N. 336; 55 T.L.R. 3; [1938] 4 All E.R. 181.

mean that there is in this case a complete absence of any complaint of violence against the husband. Indeed almost, but not quite, all the matters of which complaint is made by the wife as constituting cruelty concern the husband's failure to provide for his wife and three children in a proper manner and his finally selling the house over her head, with the result that she returned, not for the first time, to her mother's roof. Thereafter she never returned to him. [His Lordship referred to the allegation in paragraph 15 of the petition concerning the visit of the secretary of a local political association, and continued:] I would say at once, especially as this is a discretion case, that there is no suggestion of or foundation for any impropriety of conduct between the wife and the secretary. On the other hand it is not suggested that the husband's threat, which may have been made in a moment of temper, was ever followed up or ever repeated, and I do not think that that particular complaint is of any great substance nor indeed had very much effect on the ultimate break up of this family.

The evidence before me was that of the wife and her mother. I have found not the slightest ground for disbelieving the evidence of either of them and I accept their evidence as being accurate and honest. Indeed Mr. Comyn, who appeared for the Queen's Proctor, said that there was no reason for suspecting in any way the reliability of the evidence given. It occurred to me that if the wife and her mother were not both fair and honest they might have put forward a rather stronger case against the husband.

The reason which caused me to seek the assistance of the Queen's Proctor was in no way connected with the honesty or otherwise of the evidence, but because this was a case which was in some respects unusual and which required very careful consideration. The case was presented to me with the very greatest care by Mr. Mark Smith who appeared for the wife, and indeed he drew my attention deliberately and frankly to some of the attendant difficulties.

The parties were married in October, 1940. The husband, who was then a farm assistant, was 27 years of age and a bachelor, and the wife was 19 and unmarried. The parties had had sexual relations before marriage and the wife was pregnant at the time of the marriage. I mention that fact not for the purpose of moral censure but simply because I think that it is of some importance to see how the marriage started. There were two other children of the marriage, making three in all. After the marriage the parties lived together first of all with the wife's parents. The husband apparently gave her no allowance, though she asked for one, and in December, 1941, they moved to a farm, not very far away from where they had been living, which had been bought by the husband with money from a legacy of some relation. It was stated that he paid £3,500 for that farm, and the wife complained that when he was there he did not work very hard and gave her no allowance.

There were clearly a great many difficulties about the wife's position. She could never get a regular allowance from her husband, she had an increasing family to keep, and the husband's way of conducting his affairs was to run up bills at the local shops and, when really hard-pressed, reluctantly to pay them; a state of affairs which the wife described with great moderation as very worrying. The husband failed as a farmer, but I am not prepared to say whether it was his fault or merely his misfortune; the impression which I have of his actions is that he was a fairly shiftless and impracticable individual. At any rate he failed, and the wife and husband and children had to move. Inevitably the wife went back to her parents, and thereafter another child was born.

The husband, after the failure of his farm, sought employment and worked at Staplehurst. He told his wife virtually nothing about what he was earning and gave her very little, if any, financial support. After selling the farm there was one cheque for £800 which he left lying about the house for some weeks or months without paying it into his bank. What happened to the money resulting from the sale of the farm we do not know, but I have a suspicion, though no more, that it was very quickly absorbed by his many creditors. The parties later moved to a cottage not very far away from the wife's parents and yet a third child was born. Again the husband did not give the wife an allowance; he ran up bills and paid creditors when they pressed him, but the pressure by the creditors of course was not infrequently directed at the wife because they came round to the cottage to collect their money and found her there. She has described that, again I think very moderately, as being most humiliating and very worrying. So their life went on.

In 1950 the husband appears to have taken a partnership in some agricultural concern, but the financial position did not change and the wife became more and more worried and distressed. Finally, in 1952, the husband sold the lease of the home to the landlord for £300. What happened to that money I do not know, but again I suspect that it went to satisfy rapidly uphill or excessive weeding in his garden. I do not think that Dr. Parkinson, who was attending a gentleman approaching the seventies, was very much concerned with his patient's sexual activities at that time. Dr. Parkinson said that having seen the co-respondent again, his condition had very much deteriorated since he last saw him in February, 1950, and he agreed with Dr. Beadles that the co-respondent was quite unfit to give evidence in this court. So far as his capacity to indulge in sexual intercourse was concerned, Dr. Parkinson said that in 1950 he thought that the co-respondent would be more capable than now because the attack of pain which might well accompany any such exertion would not be so severe, and he thought on the whole that it would be lesser strain on this man to be masturbated than to indulge in the full coitus. So far as the wife was concerned, Dr. Parkinson saw no reason why she should not then have indulged in sexual intercourse if she wanted to.

Dr. Beadles, who is the more recent attendant, was able to go a good deal further. He informed me that amongst other troubles, which include a systolic murmur of the heart and a great many severe attacks of angina, this man has had two coronary thromboses, heart attacks, one at an unascertained date prior to January, 1953, and one more defined as to date in September, 1953; and the doctor took such a serious view of this man's present condition that he asserted without any doubt that in his view it would be very dangerous for him to give evidence in this court. So far as sexual matters are concerned, he took the view that the co-respondent had definitely deteriorated since 1950, and that whereas in 1950 he was probably capable of an emission and possibly capable of an erection, he certainly is not at this time; and he agreed when cross-examined by Mr. Willett, that the co-respondent had deteriorated probably in the last few years. He was shown the letter which I have already discussed, which was written by the co-respondent in March, 1952, and he said that that letter showed clearly that the co-respondent was capable of masturbation or of being masturbated, or of both, and possibly, and no more than possibly, of the full act of intercourse at that time.

The position can be fairly summarized as follows: at the moment and probably for a number of months this man was apparently incapable, and if he had become capable of sexual intercourse he might even have died in the attempt; but going back to the Spring of 1952 and the ensuing months, I am not satisfied, nor indeed, I think, are the doctors, that this man was then incapable. It may be, indeed I think it is very probable, that he and his industry has failed to disclose any reported case wholly like the present in the books. He did, however, call my attention to *Simpson* v. *Simpson* [1] in the Divisional Court and *Jamieson* v. *Jamieson* [2] in the House of Lords. In both those cases money was not the sole source of trouble. In *Simpson* v. *Simpson* [1] the respondent husband, who had been found by the justices to have been guilty of persistent cruelty, had committed matrimonial offences other than purely financial ones. He had made the wife's life, as it was said, " a hell," he had kept food which was reserved for himself and asked his wife to cook it for him, and had refused to take her for a holiday; he had failed to make the house comfortable and habitable, he was for long periods taciturn and unfriendly to her, and on several occasions, most important of all to my mind, he had told her to go from the home. The husband's meanness in that case, therefore, was by no means the only source of complaint.

In *Jamieson* v. *Jamieson*,[2] which was tried on the issue of whether or not the wife's averments could amount to showing a prima facie case of cruelty, it was alleged that not only was the husband very mean in providing housekeeping money and in fact had invariably failed to provide sufficient, but that he had also told the wife that he hated the sight of her when she complained, had shut the door in her face, had often been rude and threatening to her in the presence of the children and greatly humiliated her, and on one quite recent occasion, which one suspects may have been the cause of the final break-up of the home, he had threatened to throw the wife down the stairs of the matrimonial home. In that case also, therefore, the area of complaint was far less limited than in the present one.

The main difficulty in this sort of case is to find upon which side of the border between cruelty and no cruelty the facts lie. I have had the benefit of hearing argument on a large number of fairly recent authorities. It is implicit in our law since *Kelly* v. *Kelly* [3] that to find cruelty it is not necessary to find physical violence. Cruelty by words, by talk, other than violence, may none the less be cruelty and possibly in some cases more dastardly cruelty than that inflicted by blows. Nagging will suffice, if persistent; abuse, harsh language, may well be cruelty provided always that it causes either injury to health or a reasonable apprehension thereof.

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[1] [1951] P. 320.
[2] [1952] A.C. 525.
[3] L.R. 2 P. & M. 59.

Two cases, one on one side of the line and one on the other, were recently decided: in *Lauder* v. *Lauder*,[4] decided in 1948, the respondent husband had been found guilty by Ormerod J., who was upheld by the Court of Appeal, of cruelty which was marked by a form of silence which went far beyond sulking and was found to be the "sending to Coventry" of the wife by the husband because she had failed in one way or another to comply with his wishes. The essence of *Lauder* v. *Lauder*[4] is that Ormerod J., and with him the majority of the Court of Appeal, found that the silences, the sulking, and the sending to Coventry, were not expressions of the character of a naturally taciturn and silent man, but the weapon deliberately and intentionally used by him in an attempt to reduce the wife into subjection. Indeed Lord Merriman P. in his judgment pointed out[5] how effective a weapon that sort of conduct might be to a normal, healthy and affectionate wife, and it was marked in the case of the respondent in *Lauder* v. *Lauder*[6] by a refusal sometimes for periods of over a week to speak to his wife at all while in her presence he was carrying on perfectly normal and cheerful conversations with casual visitors or guests.

On the other side of the border there is *Kaslefsky* v. *Kaslefsky*,[7] which was a case of cruelty brought by a husband against the wife, and his charges were mainly based on the wife's negative conduct to him. I use the word "negative" advisedly, because the conduct was marked by a refusal by the wife of sexual intercourse when the husband returned from overseas service during the war, by a refusal to do any of the usual wifely duties in looking after the house, by keeping the child up very late, by doing no work, and by neglecting the child. She had also written while he was on service abroad saying she wanted her freedom and suggesting that the child, whom she did not want, should be adopted.

Judge Pugh, sitting as a special commissioner, in deciding the case followed the guidance of the Court of Appeal in *Westall* v. *Westall*[8] and refused to find the wife guilty of cruelty, stating that in his view the wife was lazy, or, as he put it, "sluttish," a wife who neglected her duties, but finding that in her conduct there was no evidence that those acts were intentional or aimed specifically at the husband. The husband appealed, and the Court of Appeal in a considered judgment dismissed the appeal. The wife was not represented in the case and did not appear.

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[4] [1949] P. 277.

[5] [1949] P. 277, 293.

[6] Ibid. 277.

[7] [1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398.

[8] (1949) 65 T.L.R. 337.

I need only refer to two passages in the judgments in *Kaslefsky* v. *Kaslefsky* which have often been discussed or referred to. Bucknill L.J. said [9]: "I venture to think that that "is one of the tests which has to be applied: is the conduct of the "wife, unless done for the express purpose of injuring the health "of the husband, innocent in the sense that it is justified or "justifiable under the circumstances? In cases such as refusal "of sexual intercourse, or sheer laziness, or neglect of a child, "I think that is conduct which is innocent, so far as any charge "of cruelty is concerned, unless it is done for the express purpose "of causing injury to the health of the complaining spouse."

Denning L.J. said [10]: "The conduct of one party can properly "be said to be aimed at the other when it consists of actions or "words actually or physically directed at him. Then it may be "cruelty, even though there is no desire to injure the other or to "inflict misery on him. It may consist in a display of temperament, emotion, or perversion whereby the one gives vent to his "or her feelings, not intending to injure the other, but making "the other the object—the butt—at whose expense the emotion "is relieved. The sick wife in *Squire* v. *Squire* [11] had no desire "to injure her husband, but she was guilty of cruelty because she "made her husband the butt of her inordinate demands. The "moody husband in *Lauder* v. *Lauder* [12] directed his sulkiness "at his wife, although he had no wish to hurt her. So also, the "nagging wife in *Usmar* v. *Usmar*.[13] These cases show that, "when the conduct consists of direct action against the other, "then it is not essential that there should be a specific intent to "injure or even to cause distress. Cases of this kind must, however, be carefully watched. Where there is no intent to injure "they are not to be regarded as cruelty unless they are plainly "and distinctly proved to cause injury to health."

Denning L.J. continued: "When the conduct does not consist of direct action against the other, but only of misconduct "indirectly affecting him or her, such as drunkenness, gambling "or crime, then it can only properly be said to be aimed at the "other when it is done, not only for the gratification of the "selfish desires of the one who does it, but also, in some part,

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[9] [1951] P. 38, 44.

[10] Ibid. 46.

[11] [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51.

[12] [1949] P. 277.

[13] [1949] P. 1.

" with an intention to injure the other and to inflict misery on " him or her. Such an intention may readily be inferred from the " fact that it is the natural consequence of the conduct, especially " when the one knows, or it has been brought to his notice, what " the consequences will be, and nevertheless he does it, careless " and indifferent whether it distresses the other or not. But the " court is not bound to draw the inference: the presumption that " a person intends the natural consequences of his acts is one that " may—not must—be drawn. If, in all the circumstances, it is " not the correct inference, then it should not be drawn. In " cases of this kind, if there is no desire to injure or inflict misery " on the other, the conduct only becomes cruelty when the " justifiable remonstrances of the innocent party provoke resentment on the part of the other which evinces itself in actions or " words actually or physically directed at the innocent party."

Applying those tests to the present case, the fault of the husband here is his shiftlessness, and his failure to provide properly for the wife, at any rate until after pressure had been brought upon him. Those, no doubt, are grave defects, which I doubt not were brought to his notice from time to time by a rightly aggrieved wife. I do not think that this is a case where the husband desired to injure the wife in any way, and I also think that he did not direct anything at her at all. The words of the Matrimonial Causes Act, 1937, require that to establish cruelty the husband must have treated the wife with cruelty, or vice versa, and the court has to try to ascertain in cases of this kind whether there was anything on the husband's part which could in any way be described as " treatment."

Although there may be unhappiness in a marriage the court cannot for that cause alone find cruelty. It was observed over a century and a half ago by Lord Stowell in *Evans* v. *Evans*[14]: " If it be complained that by this inactivity of the Courts much " injustice may be suffered, and much misery produced, the " answer is that Courts of Justice do not pretend to furnish " cures for all the miseries of human life. They redress or punish " gross violations of duty, but they go no farther; they cannot " make men virtuous; and, as the happiness of the world depends " upon its virtue, there may be much unhappiness in it which " human laws cannot undertake to remove." One is conscious that in cases of this kind one or other of the spouses has suffered some hardship and has been made very unhappy by the defects

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[14] (1790) 1 Hag.Con. 35, 38.

1954

EASTLAND v. EASTLAND.

Karminski J.

of character as well as conduct of the other spouse, and that, to my mind, is what has happened here. Conduct, as Mr. Comyn has pointed out, constituting cruelty must be taken as being capable of being aimed at or directed to or impinging upon the petitioning spouse and that, in the present case, is the difficulty.

In my view the husband by his conduct was not aiming anything at the wife or directing his conduct against her or in any way impinging upon her. His conduct was negative, as was the conduct of the wife in *Kaslefsky* v. *Kaslefsky.*[15] Much as I sympathise with the unhappiness of the wife in the present case, I am bound to hold as a matter of law, or as a mixed question of fact and law, that the husband's conduct, deplorable as no doubt it was, falls short of cruelty. I must therefore dismiss this petition.

I will only add this, in case this case goes to an appellate court, that had I found the husband guilty of cruelty as alleged I should have had no hesitation in exercising my discretion in the wife's favour.

Petition dismissed.

Solicitors: *Sharpe, Pritchard & Co. for Monckton, Son & Collis, Maidstone; Queen's Proctor.*

J. B. G.

[15] [1951] P. 38.

1954
Jan. 2;
Apr. 12.

W. S. Wigglesworth Ch.

In re LAPFORD (DEVON) PARISH CHURCH.

Ecclesiastical Law—Faculty—Tabernacle—Reservation of Sacrament for the sick—Use of tabernacle as receptacle—Proposed to be placed above altar of Lady Chapel and bolted to wall—Former use of "aumbry" or recess—Reservation sanctioned by bishop—Whether "tabernacle" or "aumbry" illegal church ornaments.

A faculty was sought to instal in the chapel of a parish church a "tabernacle" to serve as a receptacle for the reservation of the Holy Sacrament for the sick, and certain others, to take the place of an unsuitable "aumbry" or recess in the wall of the church:—

Held, (1) that the book of Common Prayer made no provision for the reservation of the Holy Sacrament, neither forbidding nor authorizing it, and where the bishop considered reservation was needed, it could not be held that it was an unlawful practice and the court would, by faculty, authorize necessary alterations or additions in the church to secure that due provision was made for it.

(2) That as opposed to a tabernacle an aumbry was an illegal church ornament and its use was unlawful. The application made in the present case would, therefore, not be granted.

Capel St. Mary, Suffolk v. *Packard* [1927] P. 289 applied. *Roffe-Silvester* v. *King* [1939] P. 64; 55 T.L.R. 33; [1938] 4 All E.R. 147 considered.

PETITION for a faculty in the Consistory Court, Exeter.

The Reverend Henry Pomeroy Judd, rector, and two churchwardens of the parish church of Lapford, Devon, petitioned for a faculty authorizing them to place above the centre of the altar in the Lady Chapel of their church a simple tabernacle for the reservation of the Blessed Sacrament for the sick in accordance with plans prepared by Herbert Read of Exeter.

The petition was supported by a unanimous resolution passed by the parochial church council on November 9, 1953. Citation was issued on November 17, 1953, and no one entered an appearance in opposition to the citation.

E. Garth Moore for the petitioners. Two questions arise, first, is reservation of the Blessed Sacrament lawful? and, if so, secondly, is a tabernacle lawful? It is submitted that reservation is lawful if authorized by the bishop. It is nowhere forbidden in the Book of Common Prayer or in the 39 Articles and, therefore, can be sanctioned by lawful authority—in this case by the bishop. The Archbishops' Opinions of 1900 concluded (a) that reservation is doctrinally permissible, and (b) that at present it is probably unlawful. That view as to the law is not binding on anyone; but their view as to doctrine should carry great weight. Their view of the law was in fact largely based on a misunderstanding of the rubrics in the Book of Common Prayer, which were aimed at Puritan irreverence rather than at reservation. There is no binding authority against reservation. *Gore Booth* v. *Manchester (Bishop)* [1] is authority, at most, for the proposition that reservation without the bishop's consent is unlawful; and see also *Oxford (Bishop)* v. *Henly.*[2] In *Capel St. Mary* v. *Packard,*[3] which was a faculty case in the Arches Court of Canterbury on appeal from the Consistory Court of St. Edmundsbury and Ipswich, there was no episcopal authority for reservation; moreover, that question was not argued there. Reservation in an aumbry is now very frequent, and has been permitted in many cases: the *Altofts* case[4]; *St. Mary, Swanley*[5] and *West Ilsley.*[6] This supports the view that reservation is not necessarily unlawful. The rubric at the beginning of the Book of Common Prayer directs that "chancels shall remain as in times past." In times past there was normally some receptacle for reservation and the rubric implies, therefore, that this should continue, which would not have been so if reservation were unlawful. (See also *Roffe-Silvester* v. *King.*[7])

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[1] [1920] 2 K.B. 412, 464.

[2] [1907] P. 88; 23 T.L.R. 152.

[3] [1927] P. 289.

Further, usage has by now made reservation lawful, even if it was previously unlawful. If reservation is lawful, it is as lawful in a tabernacle as in an aumbry (which is now frequent) or in a pyx. In fact there is really no such thing as a tabernacle; it is the term applied either to an aumbry in the wall immediately behind the holy table; or to a safe fixed to the holy table, in which case it is part of the holy table. In neither case is it a separate ornament.

The protection of the reserved Sacrament is provided for by the Brawling Act, 1553 (1 Mary, sess. 2, c. 3), and it is significant that though other parts of this statute have been repealed, and some parts quite recently, the part in question is still extant.

[The following cases were also referred to: *Davey* v. *Hinde*[8]; *Kensit* v. *St. Ethelburga, Bishopsgate Within*[9]; *Sheppard* v. *Bennett*[10]; *Martin* v. *Mackonochie*[11]; *St. Luke's, Southport,*[12] and *Westerton* v. *Liddell.*[13]]

Cur. adv. vult.

April 12. WIGGLESWORTH Ch. In order to avoid any misunderstanding it may be convenient if at the outset of this judgment I say that when I use the expression "tabernacle" I mean a safe placed on or immediately above an altar or a retable immediately behind an altar. By the expression "aumbry" I mean a recess in a wall containing a safe, and by the expression "pyx" I mean a receptacle suspended in the air above an altar.

The circumstances which led to this application were explained to me by the rector, who gave evidence in support of the petition. The rector was appointed in November, 1952, and on his arrival he found that the Blessed Sacrament was reserved in an aumbry resting on a window-sill in the wall on the north side of the principal altar. The aumbry had been placed there some 15 years earlier during the incumbency of the Reverend W. F. Bond who, so far as it could be ascertained, had sought and obtained the permission of Bishop Curzon, then Bishop of Exeter, to reserve the Blessed Sacrament, and for that purpose to place the aumbry on the sill. No faculty was on that occasion sought from this court. On the arrival of the present rector he was authorized by the present bishop to continue the practice of reserving the Blessed Sacrament in the aumbry and he has done so. No one suggested that there was no need for reservation in this parish. Indeed, I was told that no less than 122 sick communions had been made from the reserved Sacrament in the year 1953. In this particular parish the reserved Sacrament is also required for the communion of certain workers in a factory who are unable to make their communion in church on Sunday or weekday mornings and who, with the bishop's sanction, make their communion from the reserved Sacrament in the Lady Chapel after Evensong on those Sundays when there is no celebration of the Holy Communion in the evening. The petition was amended at the hearing so as to make it clear that the reserved Sacrament was not intended to be used only for the sick, but was also to be used for those who cannot attend the ordinary celebrations of the Holy Communion.

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[4] (1941) Unreported.

[5] (1946) Unreported.

[6] (1952) Unreported.

[7] [1939] P. 64, 91–2; 55 T.L.R. 33; [1938] 4 All E.R. 147.

[8] [1901] P. 95.

[9] [1900] P. 80; 15 T.L.R. 549.

[10] [1870] L.R. 4 P.C. 350.

[11] [1868] L.R. 2 P.C. 365.

[12] (1926) Unreported.

[13] (1857) Moore's Special Report 159, 160.

The rector found that the aumbry was neither safe (it has no lock or key) nor conveniently placed, and, shortly after his arrival, he began to consider ways and means for making other provision for the safe custody of the reserved Sacrament: he considered that a tabernacle would be better and was able to ensure that the necessary money for the change would be available, the tabernacle itself being the subject-matter of a gift. He then sought the bishop's directions in the matter and received a letter from the bishop dated December 31, 1952, which, so far as material, was as follows: "I am glad to hear that you "have been able to get a grant towards the cost of a simple "tabernacle for the reservation of the Blessed Sacrament at "Lapford, and I am content to leave it to you to decide—when "applying for a faculty—whether this shall be placed on the "High Altar or in the Lady Chapel."

Supported by this letter from the bishop, the rector with his churchwardens in the first instance presented a petition for a faculty to authorize the placing of a tabernacle on the High Altar.

1954

LAPFORD (DEVON) PARISH CHURCH, *In re.*

W. S. Wigglesworth Ch.

This proposal was considered by the Exeter Diocesan Advisory Committee, who advised against it on architectural and aesthetic grounds, adding to their report: "It would be better either "to use an aumbry in the north wall or to place the tabernacle "above the altar of the Lady Chapel in accordance with the "alternative suggestion of the bishop." It was because of this advice that the present proposal for a tabernacle on the altar in the Lady Chapel was made. Mr. Read, who described himself as a sculptor and designer, explained in the evidence he gave that it was not in fact proposed that the tabernacle should be placed on the altar, but that it should be bolted to the wall behind so that it would protrude over the back of the central part of the altar allowing a slight clearance between the bottom of the tabernacle and the top of the altar to facilitate the placing and changing of altar cloths. The Lady Chapel is so constructed that nowhere in its walls could an aumbry be conveniently placed; the north wall is occupied by the door into the vestry, leaving only a strip of wall four feet wide to the east of the door, and the east wall is largely occupied by the altar and its surrounding curtains; there is no south wall.

If the matter were free from authority I should have no hesitation in granting a faculty to authorize a rector and churchwardens to introduce into such part of a church as they select such receptacle for the reserved Sacrament as they wish in a case (like the present) where the Blessed Sacrament is reserved under the authority of the bishop, where there is no opposition and where the receptacle and its proposed site are approved by the parochial church council, the diocesan advisory committee and the bishop alike. Unfortunately, however, the matter is not free from authority; indeed, the editors of the current textbooks evidently consider the matter so far covered by authority that they feel justified in describing tabernacles as unlawful in the most uncompromising terms. For instance, the editors of the title on Ecclesiastical Law in Halsbury's Laws of England, 2nd ed., vol. 11, p. 791, say: "A tabernacle for the reception of the "reserved Sacrament is not a lawful church ornament," and the editor of Cripps on Church and Clergy, 8th ed., p. 229, says: "A tabernacle for the reservation of the Holy Sacrament is "illegal." I have, therefore, to consider carefully the authorities which those editors cite, and other authorities, in order to determine whether I am, as Mr. Garth Moore has argued, free to grant the faculty sought in the present case.

The earliest case cited is that of *Kensit* v. *St. Ethelburga, Bishopsgate Within*,[1] in which Dr. Tristram, speaking of a tabernacle which had already been removed, said [2]: " This tabernacle was clearly an illegal church ornament." The views of so learned a chancellor as Dr. Tristram are, of course, worthy of great respect, but this statement on an issue no longer before him is not an actual decision on the unlawfulness of a tabernacle. The next case is *Davey* v. *Hinde*,[3] which first came before Dr. Tristram (this time sitting as Chancellor of Chichester) in January, 1900. This case involved (among many other matters) two tabernacles, one on the principal altar and the other on the altar in a side chapel. The petitioner's counsel, Mr. Dibdin (later Sir Lewis Dibdin, Dean of Arches) argued against the legality of tabernacles, saying [4]: " They are obviously in the " church to be used for the reservation of the Sacrament, and " as the reservation of the Sacrament is clearly illegal according " to the view of the Judicial Committee of the Privy Council in " *Sheppard* v. *Bennett* [5] and *Martin* v. *Mackonochie*,[6] they must " be condemned as subserving only an illegal purpose. They are " also either unlawful church ornaments not authorized by the " ornaments rubric, or fittings of the Communion Tables, liable " to be abused by superstitious use and not authorized by law." Mr. Jelf, arguing on the other side, said [7]: " its " (that is, the tabernacle's) " illegality would only be provable if reservation " of the Sacrament had been decided to be illegal, as to which " much might be said on either side, the point being still in " doubt." Dr. Tristram Ch. ordered the removal of both the tabernacles in the church without giving any reasons.[8] It should be observed that reservation was not an issue in either of the Privy Council cases mentioned in the argument. A writ of prohibition was obtained against Dr. Tristram's first order in *Davey* v. *Hinde*, and the case came before him again some two years later, when he again ordered the removal of the tabernacles without giving any reasons (see *Rex* v. *Tristram*).[9]

The next two cases to which Mr. Garth Moore referred me were *Oxford (Bishop)* v. *Henly* [10] and *Gore Booth* v. *Manchester (Bishop)*,[11] but I need not, I feel, consider them in any detail as they were not faculty cases, and in each case reservation had been forbidden or was not permitted by the bishop concerned. The last reported case referred to in the textbooks is that of *Capel St. Mary, Suffolk* v. *Packard*,[12] a faculty case in the Arches Court of Canterbury on appeal from the Consistory Court of St. Edmundsbury and Ipswich. This case involved a number of ornaments and articles, including a tabernacle, for the removal of which North Ch. had granted a faculty " because it was illegal." Sir Henry Slesser K.C. appeared for the appellants, but felt that, as the law stood, he could not contend that the tabernacle was legal. The Dean of Arches (Sir Lewis Dibdin) affirmed the chancellor's decision for the removal of the tabernacle, observing[13]: " That is an illegal ornament used in connexion with an illegal " ceremony," and citing *Oxford* (*Bishop*) v. *Henly*[14] and *Davey* v. *Hinde*[15] as authorities.

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[1] [1900] P. 80.

[2] Ibid. 103.

[3] [1901] P. 95.

[4] Ibid. 103.

[5] (1870) L.R. 4 P.C. 350, 414.

[6] (1868) L.R. 2 P.C. 365, 383.

[7] [1901] P. 95, 106.

[8] Ibid. 121.

[9] [1902] 1 K.B. 816.

[10] [1907] P. 88; [1909] P. 319.

[11] [1920] 2 K.B. 412.

There is one other reported case which I should mention, decided since the publication of the current editions of the textbooks: it is *Roffe-Silvester* v. *King*,[16] also a faculty case in the Arches Court of Canterbury. This was an appeal from an order of the Chancellor of the Diocese of Truro (Sir William Graham-Harrison) which came before Mr. Stable K.C. as deputy-dean. It is not quite clear whether the articles in this case used for reservation fell within my definition of tabernacle or aumbry. The deputy-dean's judgment as to them was as follows[17]: " The next articles " with which I must deal are two tabernacles or aumbries, one " in a steel safe in the wall at the back of what has been called " the high altar, to which access is obtained through a door in a " wooden structure which serves at once to support the crucifix " and a cupboard, the other also in a safe in the wall above and " behind the altar in the south chancel aisle which has been called " the Jesus Altar. No grounds have been advanced which satisfy " me that the decision of the chancellor on this point was anything but right, and I affirm his order authorizing their " removal." The deputy-dean then declined an invitation to give a judgment deciding whether the practice of granting faculties for aumbries was right or wrong, but added[18]: " The " observations I have just made relate to the submissions made " on the facts of this case, and are not directed in any way to " other cases where the Sacrament is reserved with the approval " of the bishop, and application is made to a consistory court

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[12] [1927] P. 289.
[13] Ibid. 305.
[14] [1909] P. 319.
[15] [1903] P. 221.
[16] [1939] P. 64.
[17] Ibid. 91.
[18] [1939] P. 64, 92.

" for provision to be made for its proper and decent reception." He also added: "I see no ambiguity whatever in the " chancellor's judgment. He has made it clear that his judgment " does not preclude the vicar at some future time from applying " to him for a faculty authorizing an aumbry, and while it will " be open to any person interested to oppose that application, " it cannot be on the ground that by reason of the judgment given " in this case the matter is res judicata. Neither the chancellor " nor this court has prejudged any such application, nor do I " intend to express or indicate any view as to how such an " application, if it is made, should be entertained."

There are a number of unreported faculty cases dealing with receptacles for the reserved Sacrament where copies of the judgments of the chancellors are available. Among them are *St. Luke's, Southport*,[19] where Dowdall Ch. of Liverpool, in an uncontested case, granted a faculty for an aumbry; *Altofts*,[20] where Vaisey Ch. of Wakefield, also in an uncontested case, granted a faculty for an aumbry; *St. Mary, Swanley*,[21] where Ashworth Ch. of Rochester, in a contested case, refused a faculty for a tabernacle, and, in the alternative, for a pyx, and—no one objecting—granted a faculty for an aumbry; and *West Ilsley*,[22] where Scott Ch. of Oxford, in a contested case, granted a faculty for an aumbry. I shall refer later to some of these judgments.

Mr. Garth Moore also referred me to seven cases during the period 1920 to 1953 where faculties had been granted for tabernacles, but in none of those cases had there, so far as was known, been any opposition or any hearing.

Before I leave this part of the case there are two other matters which I should mention. In 1900, Archbishop Frederick Temple of Canterbury and Archbishop Maclagan of York, after hearing argument, expressed the view that although there was nothing wrong in reservation yet it was unlawful. In 1929, after the rejection of the revised prayer book by the House of Commons, the Upper Houses of the Convocations of Canterbury and York sought to regulate reservation by reference to the rubric in the revised prayer book which permitted reservation in an aumbry in the wall of a church " provided that it shall not be immediately " behind or above a Holy Table."

Of the various judgments mentioned the only two in faculty

[19] (1926) Unreported.

[20] (1941) Unreported.

[21] (1946) Unreported.

[22] (1952) Unreported.

cases which are binding on me are those in the *Capel St. Mary* case [23] and in *Roffe-Silvester* v. *King.*[24] *Roffe-Silvester* v. *King* does not bar the grant of a faculty in this case. On the contrary, it contains at least a strong hint that in cases such as this, where the Sacrament is reserved with the approval of the bishop, the chancellor can by faculty provide for its proper and decent reception.

The *Capel St. Mary* case, however, presents a greater difficulty with its twofold condemnation of a tabernacle as an illegal ornament used in connexion with an illegal ceremony. I will deal with the latter point first. I know of no authority which compels me to hold that reservation is unlawful when it takes place with the sanction of the bishop. I do not consider that it is forbidden by article 28 or by the rubric at the end of the Communion service which was inserted for a wholly different reason, namely, for the prevention of the irreverent practices of Puritans. In my view, the prayer book neither forbids nor authorizes reservation; it makes no provision for it. Where the bishop considers that something not provided for is needed, it is for the bishop to make provision in the exercise of that authority which he has in his diocese. Where he considers reservation to be needed it is for him to sanction it, and where he sanctions it, this court can and should by faculty authorize such alterations or additions in the church as are necessary to secure that due provision is made for reservation. In this connexion I derive much assistance from the judgment of Vaisey Ch. in the *Altofts* case,[25] where he said: "If I "am told that the Blessed elements are to be reserved in a "church with the sanction, or, at any rate, not contrary to the "directions or express wishes of the bishop (that is a fact to "which I am bound to pay attention), I regard it as my duty as "chancellor of the diocese, and as such, custodian of all churches "in it, to see that such reasonable steps are taken to secure the "sacred elements which are, in point of fact, to be reserved in "the church, from anything in the nature of desecration or "profanation. If I were to refuse this application, it might well "be that the vicar was driven to house the consecrated bread "and wine in some unworthy place as a cupboard in the vestry, "and in my view I am fully justified in permitting the construction of this aumbry or safe in the place now occupied by the

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[23] [1927] P. 289.

[24] [1939] P. 64.

[25] (1941) Unreported.

"piscina, and I shall direct that it may continue to be part of "the furnishing and fitting out of this church until further order."

Ashworth Ch.'s judgment in relation to the grant of the faculty for an aumbry in *St. Mary, Swanley*,[26] and Scott Ch.'s judgment in *West Ilsley*,[27] are also of much assistance on this part of the case, and I respectfully follow those three judgments. I am glad to feel able to hold the view that reservation with the sanction of the bishop is not unlawful. We all know that reservation is widely practised: I was told that the Sacrament was reserved in some 1,750 churches. It would be most unfortunate, to say the least of it, if so general a practice had to be stigmatized as unlawful.

It remains to consider the other point made in *Capel St. Mary, Suffolk* v. *Packard*,[28] namely, that a tabernacle is an illegal ornament. It was suggested in argument that this was not really a separate point, that the judgment of the Dean of Arches only amounted to a statement that, where reservation was unlawful, a tabernacle was unlawful, and that if I considered reservation in this case lawful, I was free to grant a faculty for any receptacle approved by the bishop (including a tabernacle) in any part of the church approved by the bishop, including in the wall "behind or above a Holy Table." I am unable to accept this argument.

In my view Sir Lewis Dibdin affirmed the order for the removal of the tabernacle not only because he considered reservation unlawful in that case, but also, as a separate and additional ground, because he considered a tabernacle an illegal ornament. I say this because Sir Lewis cited as authorities for his propositions not only *Oxford (Bishop)* v. *Henly*,[29] but also *Davey* v. *Hinde*,[30] and it must be remembered that he had himself been counsel in *Davey* v. *Hinde*, and in that case had argued for the removal of the tabernacles on the two grounds separately. Both grounds must, therefore, have been present to his mind when he decided the *Capel St. Mary* case.[31] That decision is binding on me and I cannot consistently with that obedience and respect which I owe to the provincial court grant a faculty for a tabernacle when it has declared that a tabernacle is an illegal ornament. This disposes of the matter, but out of deference to counsel's argument, there are certain observations which I should add.

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[26] (1946) Unreported.

[27] (1952) Unreported.

[28] [1927] P. 289.

[29] [1907] P. 88.

[30] [1903] P. 221.

[31] [1927] P. 289.

I agree with counsel that the resolution of the Upper Houses of the Convocations in 1929 are not so binding upon the bishop as to disable him from approving any place which is " behind or " above a Holy Table." In my view the only limiting factor—and it limits bishop and chancellor alike—is the ornaments rubric in general, and those decisions of binding authority which have been made thereon. The ornaments rubric prescribes that " the " Chancels shall remain as they have done in times past," and that " such ornaments of the church, and of the ministers thereof, " at all times of their ministration, shall be retained, and be in " use, as were in this Church of England, by the authority of " Parliament, in the second year of the Reign of King " Edward VI."

The Judicial Committee of the Privy Council held in *Westerton* v. *Liddell*[32] that the ornaments prescribed were the articles which were used under the first prayer book of Edward VI. This has sometimes been questioned on the ground that the Act of Uniformity, 1548, did not receive the Royal Assent until March 14, 1548–9, when Parliament was prorogued, a date in the third year of Edward VI, which had begun on January 28, 1548–9, and on the ground that the prayer book was not brought into use until a still later date, namely, Whitsunday, June 9, 1549. It was not the custom then for the Royal Assent to be given to Bills save on the last day of a session or Parliament, so it is probably true that the Act of Uniformity—although it had been passed by both Houses of Parliament by January 21, 1548–9—did not receive the Royal Assent until a date in the third year of the King's reign, but the session had begun in November, 1548, and by a fiction of law—not abolished until 1793—the whole session was supposed to be held on its first day and to last only that one day, and every Act—unless otherwise stated—took effect, by relation back, from the first day of the session: see Maxwell on Interpretation of Statutes, 10th ed. (1953), p. 409. In this sense the Act of Uniformity took effect in November, 1548, well within the second year of the reign. This supports the Privy Council's view, if, indeed, their view requires support.

So far as a tabernacle is concerned it is necessary to consider, therefore, whether it was in use under the prayer book of 1549, and in relation to this part of the case counsel quoted from books of reference which referred to the presence of tabernacles in churches at about this period. Examples of tabernacles were, however, very rare, and it seems clear that the normal method of reservation was in a pyx. In this connexion I was interested to see in one of the books submitted to me (Hierurgia Anglicana, Part II, Vol. 3, of the Library of Liturgiology and Ecclesiology for English Readers, edited by Vernon Staley, 1903, pp. 161, 162) a quotation from a letter from Dr. Eeles published in The Guardian of September 11, 1901, which included the following sentence: "The hanging pyx over the high altar is clearly the "lawful ornament by the Ornaments Rubric, as it was the ornament in use for the purpose in this Church of England in the "second year of the reign of King Edward VI. Lyndwode explains "Archbishop Peccham's constitution as covering the hanging pyx. "But he considers the aumbry in the wall near the altar safer."

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[32] (1857) Moore's Special Report, 159–160.

It is not for me to decide in this case whether the pyx was in use under a prayer book which prescribed only a temporary system of reservation: indeed, I heard no evidence on the point. What is significant is that Dr. Eeles does not suggest that a tabernacle was in use in the year in question; indeed, precisely the opposite is stated in a footnote on the same at p. 162 which includes the statement: "The tabernacle on the back of the "altar is not covered by the Ornaments Rubric, and it is part of "the Renaissance arrangement of the altar which cannot be used "in face of the rule, that 'chancels shall remain as they have "'done in times past.'" Thus, even if it were open to me to review this ground on which Sir Lewis Dibdin based his decision, it seems to me that he had good reason for it I should add that the ornaments rubric was one of the two grounds on which Ashworth Ch. granted a faculty for the removal of a tabernacle in *St. Mary, Swanley.*[33] Mr. Garth Moore also suggested that the tabernacle could in the present case be called an aumbry and that I could grant a faculty for it under that name. It is true that faculties are constantly granted for aumbries and that nowhere, so far as I know, have they been held to be unlawful ornaments, but I cannot regard the receptacle in this case as an aumbry. It may be wondered how it is that a tabernacle is an unlawful ornament and an aumbry is not, but for a long time now an aumbry has been treated as not constituting an ornament at all, but as part of the furnishings of the church let into the wall. Ashworth Ch. felt able so to treat an aumbry in the *St. Mary, Swanley* case,[33] and other chancellors have taken the same line. A tabernacle has been held to be an unlawful ornament, but an aumbry

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[33] (1946) Unreported.

1954

LAPFORD (DEVON) PARISH CHURCH, *In re.*

W. S. Wigglesworth Ch.

has not, and unless and until there is a decision of a higher court declaring an aumbry an unlawful ornament, there is in my view no need for bishop or chancellor to feel limited by the ornaments rubric when considering in any given case whether an aumbry is a suitable receptacle for the reserved Sacrament.

The result is that the application fails, but I am glad to think that this result does not leave the parish without any provision for the reserved Sacrament. The parish still has the aumbry, which has been used for the last 15 years and, if its inconveniences are such that it is thought necessary for other provision to be made, alternative proposals not involving a tabernacle can be put before this court.

Petition refused.

Solicitors: *Trollope & Winckworth.*

H. G.

1954
Mar. 2;
May 26;
June 4.

Karminski J.

STRANSKY *v.* STRANSKY.

Husband and Wife—Divorce—Residence—"Ordinarily resident" in England—Temporary absence—Jurisdiction—Matrimonial Causes Act, 1950 (14 *Geo.* 5, *c.* 25), *s.* 18 (1) (*b*).
Residence.

A test of the place of "ordinary residence" within the meaning of section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, is the answer to the question: Where was the wife's real home during the relevant period?

Where the court is asked under the section to entertain proceedings by a wife whose husband is not domiciled in England, the period of three years "ordinary residence" in this country is not broken by mere temporary absences, such as a holiday abroad, nor would the period necessarily be broken by a longer absence, as where the wife accompanied her husband on a business journey overseas. The use of the term "resident" as a requirement at the time of the institution of the suit, and the term "ordinarily resident" during the preceding three years, is neither meaningless nor accidental.

A wife married to a Czechoslovak presented a petition for divorce in July, 1953, on the ground of adultery. The husband had not at that time acquired a domicile of choice in England. During the preceding three years the wife had spent in all over 15 months in Munich, where the husband had been employed until October, 1952, but throughout the three years the wife had maintained a flat in London where the parties had lived from time to time between 1948 and 1952, to which the wife had also returned on occasions without the husband, and where the wife was resident at the time of the presentation, and of the hearing, of her petition. She never let the flat and kept it ready for occupation as the permanent home during the absences abroad:—

Held, that, since the long sojourns in Munich were accidental in the sense that they were dictated by the exigencies of the husband's work, and there was no intention on the wife's part to make Munich her home for an indefinite period, she had been "ordinarily resident" in England within the meaning of section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, during the relevant period, and the court accordingly had jurisdiction to hear her petition and to grant her a decree.

Hopkins v. *Hopkins* [1951] P. 116; 66 T.L.R. (Pt. 2) 896; [1950] 2 All E.R. 1035 distinguished.

UNDEFENDED PETITION for divorce.

The following statement of facts is taken from the judgment: The parties were married in London on July 21, 1944. At the time of the marriage the wife was a British subject and the husband, who was born in Brno in 1914, a Czechoslovak, in exile from his country which was then under German occupation. At the conclusion of the war in the summer of 1945 the husband returned to Czechoslovakia and was joined in Prague by the wife in July of that year.

The parties lived together in Prague and a child of the marriage was born to them there in August, 1946. But on March 2, 1948, the husband was again compelled to leave Czechoslovakia for political reasons. On April 2, 1948, the wife and the child, who had also left Prague, rejoined the husband in London. There they lived together in temporary accommodation until they moved together into a flat at 30, Clabon Mews, London, S.W.1, where the wife still resided at the date of the hearing. When they moved into the flat the husband was unemployed; but towards the end of 1949 he obtained temporary work as a journalist on the staff of an English weekly newspaper.

Towards the end of 1950 the husband entered the employment of the National Committee for Free Europe and was sent to Munich to broadcast from that city, and was joined there by the wife in January, 1951. The child of the marriage was left in London, as at that time the husband was working in Munich on a monthly basis. In February, 1951, the wife came back to London leaving the husband in Munich, but rejoined him there with the child in April, 1951.

At that time the wife did not expect to remain in Munich for long and took with her only a limited quantity of clothing. Her flat at Clabon Mews, which was furnished with her own furniture and possessions, remained open and at all times ready for her occupation. It was kept clean and aired by the domestic help usually employed by the wife. In April, 1951, the parties were living in furnished billets near Munich controlled by the United States army authorities. In July, 1951, they moved to new billets nearer to the centre of Munich, and these billets were again allotted to them by the United States army. In September, 1951, the parties returned to England, leaving the child in Munich. At the end of October, 1951, they returned to Munich, where the wife was taken seriously ill soon after their return. They remained together in Munich until June, 1952, when the wife came back to London alone and lived for a short time in the flat in Clabon Mews. At that time the husband knew that his work in Munich was ending and that he would shortly be transferred elsewhere. In July, 1952, the wife returned to Munich and rejoined the husband. In September, 1952, the husband left Munich by reason of a change in his employment, but the wife was unable to accompany him to England by reason of her illness. She was, however, able to return home to Clabon Mews in October, 1952, but by that time the husband had left for New York, where he was temporarily employed by the same organization.

The wife did not join the husband in New York, but in March, 1953, he returned to London and the parties lived together for a few days at Clabon Mews, and subsequently went together to Paris and Rome. At that time the relationship between the parties was greatly strained, and in April, 1953, the parties finally separated and the husband wrote a letter to the wife in which he made it clear that he was in love with the woman named in this petition and had committed adultery with her. The wife continued to reside in her flat at Clabon Mews up to the date of the hearing, presenting her petition on July 28, 1953.

The court held, on the evidence, that the husband had not acquired a domicile of choice in England, and the question accordingly arose whether the court had jurisdiction under section 18 (1) (*b*) of the Matrimonial Causes Act, 1950.[1]

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[1] Matrimonial Causes Act, 1950, s. 18: "(1) Without prejudice to any "jurisdiction exercisable by the court "apart from this section, the court "shall by virtue of this section have "jurisdiction to entertain proceedings "by a wife in any of the following "cases, notwithstanding that the husband is not domiciled in England, "that is to say:—

". . . (*b*) in the case of proceedings "for divorce or nullity of marriage, "if the wife is resident in England "and has been ordinarily resident

The assistance of the Queen's Proctor was invoked in argument.

Colin Duncan and *A. T. Hoolahan* for the Queen's Proctor. The purpose of subsection (1) (*b*) of section 18 of the Matrimonial Causes Act, 1950, is to invest the court with jurisdiction in cases where the court would otherwise have none. A wife's domicile must depend upon her husband's personal intentions, and if she cannot claim the jurisdiction of the court because of her husband's domicile she can do so under the subsection if she has been "ordinarily resident" in England for the statutory period of three years. This conforms with principles of jurisdiction accepted in the ecclesiastical courts. Such residence is of the same quality as domicile; there must be no break in the period of "ordinary "residence," and she cannot be said to have been "ordinarily "resident" in two places at the same time. In construing section 18 (1) (*b*) consideration must be given to the distinction in the subsection between the words "ordinarily resident" during the relevant three years, and "resident" at the date of the institution of the suit.

Observations made in revenue cases can assist this court in determining the meaning of the words "ordinarily resident" in the subsection, but they should be approached with caution. Those cases were concerned not with the location of a person's home, but with that of his fiscal liability; and it appears from those cases that for the purposes of taxation a person may be resident in two places at the same time, as in *Cooper* v. *Cadwalader.*[2] But that principle cannot be applied in matters relating to jurisdiction in divorce. It would be difficult to say that a woman in a position similar to that of the respondent to the appeal in *Commissioners of Inland Revenue* v. *Lysaght* [3] had been "ordinarily resident" in England so as to give jurisdiction to the court in divorce. A further difficulty is that the reports are of cases in the appellate courts, where there had been a finding of fact in the court below, and the question therefore arose whether there was evidence upon which the commissioner might properly act.

The meaning of "residence" has been considered in other

"there for a period of three years "immediately preceding the commencement of the proceedings, and "the husband is not domiciled in any "other part of the United Kingdom "or in the Channel Islands or the "Isle of Man."

[2] (1904) 5 T.C. 101.

[3] [1928] A.C. 234; 44 T.L.R. 374.

branches of jurisdiction, as in *Manning* v. *Manning*,[4] where the petitioner had in any event been disbelieved by the court, and in *Lowry* v. *Lowry*,[5] where the phrase under consideration by the Divisional Court was "if the applicant in the proceedings resides "in England and the parties last ordinarily resided together as "man and wife in England." It is submitted that in cases where the jurisdiction of the court is invoked under section 18 (1) (*b*) of the Act of 1950 the true test to be applied is: "Where "was the wife's real home during the relevant period?" She cannot say that at any given time during that period she had two homes at once, and if she has spent part of her time abroad it is for the court to decide where she had her bona fide home during that period, and what was the nature of her residence abroad. In *Hopkins* v. *Hopkins*[6] the wife had settled in Canada for a period of some five months with her husband, who had acquired a domicile of choice in that country; there was nothing to suggest that she had merely intended a temporary visit. If she had continued to maintain a flat in England that would, of course, have been a factor in deciding in which country she had her real home.

[KARMINSKI J. There are two important matters in this case: (1) for some 15 months in all the wife lived in Munich; (2) throughout that period she maintained the home in London.]

Which was her real home? A wife could not bring herself within the jurisdiction by deliberately maintaining an empty house in England. A difficulty might arise, however, in a case where a wife of limited means had been unable to afford to keep on a home in England while resident abroad.

[KARMINSKI J. But that is one of the factors which might dictate to her her choice of home, which must be regulated by the individual's means.]

The fact that the parties did not want to go abroad would not show that they remained "ordinarily resident" in this country.

Neil Lawson for the wife. The husband's employment was of a temporary nature and on a monthly basis. While in Munich the parties were billeted in requisitioned property with furniture supplied by the authorities. Their home was in England, and they returned there whenever it was possible. The absences were not continuous, and the wife in fact never gave up her English home. A vital test in considering a change of residence is to be found in *Macrae* v. *Macrae*[7]: "Ordinary residence can be "changed in a day. A man is ordinarily resident in one place up "till a particular day: he then cuts the connexion he has with "that place." There was no such "cutting of connexion" in the present case, as there was in *Hopkins* v. *Hopkins*.[8]

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[4] (1871) L.R. 2 P. & M. 223.

[5] [1952] P. 252; [1952] 1 T.L.R. 1508; [1952] 2 All E.R. 61 (Maintenance Orders Act, 1950, s. 1 (1)).

[6] [1951] P. 116; 66 T.L.R. (Pt. 2) 896; [1950] 2 All E.R. 1035.

It is not disputed that the court must be wary of applying too rigidly the decisions in the revenue cases to cases under section 18 (1) (*b*) of the Act of 1950. The subsection itself uses the words "residence" and "ordinary residence" in different senses. But it is not accepted that it is impossible within the meaning of the subsection for a person to have two "ordinary residences" at the same time, such, for example, as a town house and a country house used at different periods of the week; and this might apply if the two houses were on different sides of the border between England and Scotland, or even of the Channel. But such cases are in any event distinguishable, for the two residences would have been taken as the result of a voluntary choice, whereas in the present case the wife was forced by circumstances to spend part of her time abroad, so as to be with her husband during his temporary duties.

"Ordinary residence" must always be a question of fact, having regard to the physical circumstances and the element of intention. It is conceded that the test suggested—"Where is the "real home?" is most helpful, but it might be possible to have two homes.

[KARMINSKI J. referred to Lord Buckmaster's reference in *Commissioners of Inland Revenue* v. *Lysaght*[9] to the element of compulsion not necessarily affecting a finding of "ordinary "residence" in tax cases.]

Although dicta in revenue cases must be applied with caution in cases under subsection (1) (*b*) of section 18 of the Act of 1950, both the Divisional Court in *Lowry* v. *Lowry*[10] and Pilcher J. in *Hopkins* v. *Hopkins*[11] considered them and in part relied on them.

Cur. adv. vult.

June 4. KARMINSKI J. read the following judgment: On July 28, 1953, the petition in this case was presented to the court. The petition alleges, inter alia, that the husband committed adultery on a number of occasions between October,

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[7] [1949] P. 397, 403; 65 T.L.R. 547; [1949] 2 All E.R. 34.

[8] [1951] P. 116.

[9] [1928] A.C. 234, 248.

[10] [1952] P. 252.

[11] [1951] P. 116.

1951, and the date of the petition with the woman named. The evidence in support of the petition satisfied me that the adultery complained of by the wife had been duly proved, and I so find. The real question of difficulty in this case is that of the jurisdiction of this court. The petition alleges that the wife had been ordinarily resident at an address in London for a period of three years immediately preceding the commencement of these proceedings. It further alleges that the wife and the husband are domiciled in England.

When the case was first heard as an undefended suit it became apparent that the question of jurisdiction was not free from difficulty, and I therefore invited the assistance of the Queen's Proctor under section 10 of the Matrimonial Causes Act, 1950. In the result, I have had the advantage of very full and helpful arguments both from Mr. Colin Duncan for the Queen's Proctor and from Mr. Neil Lawson who appeared for the wife.

For the purpose of deciding the question of jurisdiction it is necessary to examine the history of the parties and of their married life together. [His Lordship stated the facts set out above, considered the evidence as to domicile, and continued:] The question of domicile in this case is not, in my view, one that presents any real difficulty. If the husband's domicile of origin was Czechoslovak it is necessary for him to prove with perfect clearness and satisfaction that he had formed at the time of the petition a fixed and settled purpose to abandon his Czechoslovakian domicile and settle in England. This test I take from the speech of Lord Macnaghten in *Winans* v. *Attorney-General.*[1] If the court cannot come to a conclusion on the evidence whether the husband did or did not intend a change of domicile, then the domicile of origin must remain. It is clear here that the husband lived and was domiciled in Czechoslovakia until he was forced into exile on two occasions. Before, on the facts of this case, the court could be satisfied that he acquired a domicile of choice here it would be necessary to prove not only the undoubted fact that the husband has not resided in Czechoslovakia since 1948, but that he has formed a clear intention of settling in England. On the evidence before me I have come to the conclusion that in July, 1953, the husband had formed no such clear intention and had not, therefore, acquired a domicile of choice in England.

I now turn to consider the question whether or not the wife

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[1] [1904] A.C. 287, 292; 20 T.L.R. 510.

1954

STRANSKY
v.
STRANSKY.

Karminski J.

has established that she was ordinarily resident in England for the three years immediately preceding the commencement of these proceedings, that is, prior to July 28, 1953. Section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, confers jurisdiction on the court on a wife's petition for divorce notwithstanding that the husband is not domiciled in England, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings. In this case there can be no doubt that the wife was in fact resident in England on July 28, 1953. The question I have to decide is whether or not she was ordinarily resident for the three years preceding that date, notwithstanding the admitted fact that for 15 months out of that period she was living in Munich.

The meaning of the words "ordinarily resident" has been frequently discussed in tax cases, and although the problem in the present case arises on the construction of section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, great help can be derived from consideration of some of the cases under the Income Tax Acts. In *Pickles* v. *Foulsham* [2] Rowlatt J. emphasized that the word "residence" must only be used as signifying an attribute of the person, and that confusion might follow by thinking of residence in the sense of a house or place of residence. In *Levene* v. *Commissioners of Inland Revenue* [3] Viscount Cave L.C. said: ". . . the word 'reside' is a familiar English word and is defined "in the Oxford English Dictionary as meaning 'to dwell per-"'manently or for a considerable time, to have one's settled or "'usual abode, to live in or at a particular place.'" Dealing with the meaning of the words "ordinarily resides," Viscount Cave L.C. said [4]: "The expression 'ordinary residence' is found in "the Income Tax Act of 1806 and occurs again and again in the "later Income Tax Acts, where it is contrasted with usual or "occasional or temporary residence; and I think that it connotes "residence in a place with some degree of continuity and apart "from accidental or temporary absences. So understood the "expression differs little in meaning from the word 'residence' "as used in the Acts; and I find it difficult to imagine a case in "which a man while not resident here is yet ordinarily resident "here." In *Commissioners of Inland Revenue* v. *Lysaght*, [5]

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[2] [1923] 2 K.B. 413; 39 T.L.R. 478, 479; 9 Tax Cas. 261, 274.

[3] [1928] A.C. 217, 222; 44 T.L.R. 374.

[4] [1928] A.C. 217, 225.

[5] [1928] A.C. 234, 244.

Viscount Sumner, discussing the meaning of the word "resident," said: "Grammatically the word 'resident' indicates a quality "of the person charged and is not descriptive of his property, real "or personal. To ask where he has his residence is often a "convenient form of inquiry, but only as leading to the question "'then where is he resident himself?'" Pointing out that many nomads are homeless folk, though they may reside continually within the limits of the United Kingdom, Lord Sumner said that property is no conclusive test. Discussing the meaning of the word "ordinarily," Lord Sumner pointed out[6] that the statute which he was there considering, namely, the Income Tax Act, 1918, did not use any qualifications such as "usually" or "most "of the time," or "exclusively," and he added: "I think the "converse to 'ordinarily' is 'extraordinarily' and that part of "the regular order of a man's life, adopted voluntarily and for "settled purposes, is not 'extraordinary.'"

Turning from the tax cases, the industry of counsel was able to discover only one case decided under section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, namely, *Hopkins* v. *Hopkins*.[7] In that case, which was a wife's petition for divorce alleging cruelty, the parties were married in Canada in 1943. In February, 1949, she returned to England and presented her petition on October 11, 1949, when she was clearly resident in England. It appeared that for five out of the relevant 36 months she was in fact resident in Canada. In that case it also appeared that during the five months during which the petitioner was living with the respondent in Canada neither of them had any home of their own in England. On those facts Pilcher J. decided that the wife was not ordinarily resident in England within the meaning of section 1 of the Law Reform (Miscellaneous Provisions) Act, 1949, which has been re-enacted in section 18 (1) (*b*) of the Matrimonial Causes Act, 1950. In the course of his considered judgment Pilcher J. referred to the tax cases and to the principles there established, and after a full consideration of those cases found on the facts of that case that the wife while physically present in Canada was ordinarily resident there. He further came to the conclusion, again on the facts of that case, that the adverb "ordinarily" added nothing to the adjective "resident." Since the wife in *Hopkins* v. *Hopkins*[7] had during the critical five months' period given up her English residence entirely, and had acquired a residence in Canada, I am in respectful agreement with both his reasoning and his conclusion in that case.

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[6] [1928] A.C. 234, 243.

[7] [1951] P. 116.

But it is to be observed that section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, uses the term " resident " as a requirement at the time of the institution of the suit, and the term " ordinarily " resident " as a requirement during the preceding three years. I do not think that the use of the two terms is either meaningless or accidental. Clearly, mere temporary absences from England, such as a holiday abroad, would not make a gap in the period of ordinary residence. Nor, in my view, would a longer gap of some months, such as one caused by a journey overseas by a wife accompanying her husband on a business trip, necessarily break the period of ordinary residence. In *Macrae* v. *Macrae*,[8] a case under the Summary Jurisdiction Acts, the Court of Appeal had to consider the question of a change of residence by a husband from England to Scotland. Somervell L.J. said [9]: " Ordinary residence " can be changed in a day. A man is ordinarily resident in one " place up till a particular day: he then cuts the connexion he " has with that place—in this case he left his wife; in another " case he might have disposed of his house or anyhow left it " and made arrangements to make his home somewhere else. " Where there are indications that the place to which he moves " is the place which he intends to make his home for at any rate " an indefinite period, then as from that date in my opinion he is " ordinarily resident at the place to which he has gone." It will be observed that Somervell L.J. emphasized the importance of a place and of a house, though I do not think that he was making these factors the only tests in every case. But as Mr. Colin Duncan suggested in argument, one of the tests in the present case is to find the answer to this question: Where between July 28, 1950, and July 28, 1953, was the wife's real home? The flat at 30, Clabon Mews, she acquired in October, 1948: thereafter she never let it, in spite of the prolonged absences abroad. Indeed, throughout those absences she kept it ready for occupation, and returned there whenever circumstances permitted. She is, indeed, still living there. Her long sojourns in Munich were accidental in the sense that they were dictated by the exigencies of the husband's work: I can find no intention on the wife's part to make Munich her home for an indefinite period. So far from disposing of her flat at Clabon Mews, she went to trouble, and probably to some expense, to keep it as a

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[8] [1949] P. 397.

[9] Ibid. 403.

1954

STRANSKY
v.
STRANSKY.

Karminski J.

permanent home. The wife has satisfied me that she was ordinarily resident in England for a period of three years immediately preceding the commencement of these proceedings. This court has therefore jurisdiction to dissolve her marriage with the husband. The wife has proved the contents of her petition and I pronounce a decree nisi accordingly.

Decree nisi.

Solicitors: *Edwin Coe & Calder Woods; The Queen's Proctor.*

J. B. G.

C. A.

BARBER *v.* BARBER.

1954
May 3, 7.

Jenkins and
Hodson L.JJ.

Husband and Wife—Restitution of conjugal rights—Divorce—Petition—Prayer for dissolution in answer alleging cruelty—Whether separate petition necessary—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 32*—Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 6.

In her answer to a husband's petition for restitution of conjugal rights the wife stated that she had just cause for leaving him on the ground of cruelty against her, and she prayed for dissolution of the marriage on the ground of cruelty. On a summons issued by the petitioner, the judge in chambers ordered that that part of the prayer of the answer which prayed for dissolution be struck out. On appeal:—

Held, that by virtue of section 32 of the Judicature Act, 1925,[1] and section 6 of the Matrimonial Causes Act, 1950, the High Court had jurisdiction to entertain a prayer for divorce a vinculo in answer to a petition for restitution of conjugal rights, even although the ecclesiastical courts would have had no jurisdiction to grant that particular form of relief; and that the practice which had arisen of accepting jurisdiction to pronounce decrees of divorce in cases

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

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[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 32: "The jurisdiction vested in the High "Court and the Court of Appeal "respectively shall, so far as regards "procedure and practice, be exercised "in the manner provided by this Act "or by rules of court, and where no "special provision is contained in this "Act or in rules of court with reference thereto, any such jurisdiction "shall be exercised as nearly as may "be in the same manner as that in "which it might have been exercised "by the court to which it formerly "appertained."

Matrimonial Causes Act, 1950, s. 6: "If in any proceedings for divorce "the respondent opposes the relief "sought on the ground of the petitioner's adultery, cruelty or desertion, the court may give to the "respondent the same relief to which "he or she would have been entitled "if he or she had presented a petition "seeking such relief."

of this nature, without requiring a separate petition, should be recognized as a legitimate mode of procedure.

Timmins v. *Timmins* [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187 considered.

Decision of Wallington J. reversed.

APPEAL from Wallington J. sitting in chambers.

The parties were married on January 7, 1944, and on July 27, 1953, they separated. On November 18, 1953, the husband filed a petition for restitution of conjugal rights. By her answer, dated February 18, 1954, the wife admitted that she had ceased to live with the petitioner, but stated that she had just cause for refusing to live with him. There followed a number of paragraphs alleging cruelty against the petitioner, and the answer concluded with a prayer that the prayer of the petition might be rejected and (inter alia) that the marriage might be dissolved. Upon a summons issued by the husband, Wallington J., on April 6, 1954, struck out that part of the prayer of the answer which prayed for a dissolution, and he gave leave to appeal.

Mordecai Levene for the wife. The judge in chambers accepted the contention that there could not be a cross-prayer for dissolution of marriage in answer to a petition for restitution of conjugal rights because the practice was unknown to the ecclesiastical courts, and he said that a cross-petition should have been filed. He appears to have based his decision on section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925, and *Pickett* v. *Pickett* (*orse. Moss*).[2] Section 32 of the Act of 1925 is not, however, relevant to the present question, for the practice having been unknown before 1857, it is impossible to discover what "might have been" the practice in the ecclesiastical courts in regard to this matter. *Pickett* v. *Pickett* [2] is distinguishable; it was a nullity case, and therefore, plainly, allegations of matrimonial offences, even if proved, were no answer to the petition and were irrelevant.

Where the respondent to proceedings for restitution of conjugal rights seeks dissolution of the marriage, the practice for many years has been to pray for dissolution in the answer to the petition and not to file a separate petition. The practice is obviously convenient and has never been adversely commented on in any reported case: see, for example, *Timmins* v. *Timmins*,[3] where the circumstances were precisely the same as those in the present case, and yet no point was taken that there was no jurisdiction to entertain the prayer for divorce in the answer. [Reference was also made to *Norton* v. *Norton*,[4] and Latey on Divorce, 14th ed., p. 660.]

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[2] [1951] P. 267; [1951] 1 T.L.R. 585; [1951] 1 All E.R. 614.

[3] [1953] 1 W.L.R. 757; [1953] 1 All E.R. 187.

William Frankel for the husband. The petitioner is seeking restitution of conjugal rights, which was formerly relief granted by the ecclesiastical courts. The respondent seeks dissolution of the marriage, a form of relief unknown to the ecclesiastical courts and now purely a statutory remedy. It is contrary to practice to join in a restitution suit a claim for divorce by way of answer; a separate petition is necessary. This follows from the language of section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that where there is no special provision in the Act or in rules of court applicable—and there is none in respect of proceedings for restitution—the jurisdiction to be exercised by the High Court " shall be exercised as nearly as may " be in the same manner as that in which it might have been " exercised by the court to which it formerly appertained." Proceedings for restitution of conjugal rights were formerly brought in the ecclesiastical courts, which could not grant a divorce a vinculo. Accordingly, by virtue of section 32 of the Act of 1925, the High Court cannot in proceedings for restitution grant in *that* suit a decree for dissolution of marriage. It follows that, in answer to a petition for restitution of conjugal rights a prayer for dissolution of the marriage should not be included. [Reference was also made to *Pickett* v. *Pickett* (*orse. Moss*)[5] and *Russell* v. *Russell*.[6]]

Levene replied.

Cur. adv. vult.

JENKINS L.J. The judgment about to be read by Hodson L.J. is the judgment of the court.

HODSON L.J. This appeal raises a highly technical question of procedure which does not appear to be directly covered by authority, although the question has been tacitly answered in favour of the appellant on more than one occasion.

The appeal arises in this way: on November 18, 1953, the petitioner husband presented a petition for restitution of conjugal rights on the ground that his wife had refused to live with him. By her answer, dated February 18, 1954, the wife admitted that

[4] [1945] P. 56.

[5] [1951] P. 267.

[6] [1895] P. 315.

she had ceased to live with the petitioner, but said that by reason of the facts thereinafter stated she had and still has just cause for refusing to live with him. Following a number of paragraphs containing allegations of cruelty against the petitioner, the answer concluded with a prayer that the prayer of the petition might be rejected and (inter alia) that the marriage might be dissolved. Upon a summons issued by the husband, Wallington J., on April 6, 1954, struck out that part of the prayer of the answer which prayed for a dissolution, and gave leave to appeal to this court. The matter was heard in chambers and no reasons for the order are available, but it seems that the judge considered that the right to claim divorce in answer to a petition is regulated by statute, and that there was no statutory provision enabling the respondent to a suit for restitution to make such a claim; accordingly, the respondent must make such a claim, if so advised, by separate petition.

Section 6 of the Matrimonial Causes Act, 1950, provides: "If in any proceedings for divorce the respondent opposes the "relief sought on the ground of the petitioner's adultery, cruelty "or desertion, the court may give to the respondent the same "relief to which he or she would have been entitled if he or she "had presented a petition seeking such relief." This section reproduces in shortened form section 180 of the Supreme Court of Judicature (Consolidation) Act, 1925, which, in turn, replaced with a slight extension, immaterial to this case, section 2 of the Matrimonial Causes Act, 1866.

Since these proceedings are not proceedings for divorce, but for restitution of conjugal rights, which would formerly have been determined by the ecclesiastical courts, regard must be had to section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925. [His Lordship read the section, and continued:] There is no special provision in the Act or in rules of court applicable, and the jurisdiction in restitution proceedings formerly appertained to the ecclesiastical court, which had no power to pronounce a decree of divorce a vinculo, which is now a purely statutory remedy. Hence, it is said that there is no room in a restitution suit for a claim for divorce, which must accordingly be the subject of a separate petition.

On a literal reading of the section, we think that there is force in this contention, unfortunate though it would be if the expense and inconvenience of a separate petition were to be held necessary in such cases as the present, where divorce is prayed;

C. A.
1954

BARBER
v.
BARBER.

whereas if the relief sought in the answer were judicial separation (an ecclesiastical remedy) no such step would be necessary: see *Blackborne* v. *Blackborne*.[1] If, however, a more liberal meaning can fairly be given to the section, it will be possible for the relevant issues between the parties to be decided in the same proceedings and the appropriate consequential relief granted.

The question has arisen in a slightly different form in nullity proceedings, where respondents to petitions have sought to raise issues as to adultery, cruelty and desertion in answer to a petition praying for a declaration of nullity of marriage. In such cases it has been pointed out that such issues are irrelevant to the nullity suit, since if there is no marriage, proof of such matrimonial offences is no answer to the petition: compare *Pickett* v. *Pickett* (*orse. Moss*).[2] In a suit for restitution of conjugal rights, however, such issues can be raised as an answer to a petition and, indeed, since the decision of this court in *Russell* v. *Russell*,[3] defences to a suit for restitution of conjugal rights are not limited to so-called matrimonial offences.

It is, we think, plainly desirable that when such issues are relevantly raised by way of answer in the original suit, the court should be able to give the respondent relief in the same proceedings in accordance with the findings made upon those issues. That the ecclesiastical courts would have so acted if placed in the position in which the court now finds itself appears to be supported by the language of Dr. Lushington in a nullity case cited as *Anonymous*,[4] where he said: "The results of these cases "were two-fold: first, if the marriage be denied, that question "must be disposed of before evidence can be taken as to adultery "or cruelty; second, that without fresh citation the court may, "in any matrimonial suit where the validity of the marriage "has been disposed of, receive an allegation pleading adultery "or cruelty, and separate the parties if it be proved. Therefore, "I am of opinion, both upon principle and authority, that I ought "not now, at this stage of the cause, to admit the article pleading "adultery to proof; but I am equally clear, for the same reason, "that the court might possibly come to a decision in this case "which would justify the court in receiving this, or an allegation "to the same effect."

Although the relief claimed in the answer in this case is not such as could have been given by the ecclesiastical court in any proceedings, it is not, we think, unduly straining the language of section 32 of the Act of 1925 to hold that regard may be had to the effect of subsequent legislation in deciding whether or not the proposed exercise of jurisdiction vested in the High Court would be an exercise of it as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained.

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[1] (1868) L.R. 1 P. & M. 563.

[2] [1951] P. 267; [1951] 1 T.L.R. 585; [1951] 1 All E.R. 614.

[3] [1895] P. 315; 11 T.L.R. 579.

[4] (1857) Dea. & Sw. 295, 304.

The allegation in the answer is relevant to the petition and, reasoning by analogy, having regard to the language of Dr. Lushington in the anonymous case to which we have referred,[5] and from which it appears that the ecclesiastical courts would, in proceedings for restitution of conjugal rights, have entertained an application by the respondent for such relief as then could be granted in respect of the adultery or cruelty of the opposite party, we do not think that the High Court is bound to decline jurisdiction to entertain a prayer for divorce a vinculo in the answer merely upon the ground that the ecclesiastical courts would have had no jurisdiction to grant that particular form of relief.

We are fortified in this opinion by the knowledge that a practice has grown up of accepting jurisdiction to pronounce decrees of divorce in such a case as the present without insisting on a separate petition. *Timmins* v. *Timmins*[6] is an example of such a case, where the circumstances were exactly parallel to those in the case now under consideration. It is true that the prayer for relief was rejected, but no point was taken, either at first instance or in the Court of Appeal, that there was no jurisdiction to entertain the prayer for divorce in the answer. The same situation arose in a recent unreported case [in the Court of Appeal] of *Werber* v. *Werber*,[7] which is within the recollection of both members of this court, where again no relief was granted, but no point as to jurisdiction was taken.

In our judgment, this course, now commonly followed in practice, is sufficiently warranted by the construction we have placed on section 32 of the Act of 1925, and should be recognized as a legitimate mode of procedure. We would, accordingly, allow the appeal.

Appeal allowed.

Solicitors: *Ronald Fletcher & Co.; Cameron, Kemm & Co.*

[5] Dea. & Sw. 295.

[6] [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187.

[7] Unreported: April 2, 1954.

C. A.

1954
May 26.

Evershed M.R.,
Denning and
Hodson L.JJ.

WEST *v.* WEST.

Husband and Wife—Maintenance—High Court—Wilful neglect to maintain—Reasonable belief in wife's adultery—Husband's petition for divorce founded on adultery dismissed—Whether husband guilty of wilful neglect to provide maintenance before petition dismissed—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23 (1).

On March 16, 1953, a wife took out an originating summons under section 23 of the Matrimonial Causes Act, 1950, for maintenance. Two days later her husband presented a petition for the dissolution of his marriage on the ground of the wife's adultery, and the application for maintenance was adjourned to come on for hearing with the petition. On Friday, February 12, 1954, the commissioner found, as a fact, that the wife had not been guilty of adultery and dismissed the husband's petition. On Monday, February 15, he heard the wife's application under the Act of 1950 and expressed the opinion that the husband had, until the petition was dismissed, reasonable grounds for suspecting that the wife had committed adultery. The commissioner, however, held that the husband had been guilty of wilful neglect to provide reasonable maintenance and, pending the investigation of the parties' means, ordered the husband to pay to the wife £4 per week:—

Held, that a finding of fact that a wife had not committed adultery was conclusive to prevent a husband thereafter trying to establish a bona fide and reasonable belief in the adultery, but such a finding did not prevent a husband alleging that, until the court so found, he bona fide and reasonably believed that his wife had committed adultery, and for that reason justifying an alleged desertion or failure to maintain; and that, accordingly, the husband was entitled to say on February 15, 1954, that he had an answer to the summons issued in March, 1953, which should have been dismissed.

Allen v. *Allen* [1951] W.N. 322; [1951] 1 All E.R. 724 considered and explained.

Appeal from Judge Rewcastle sitting as special commissioner at Birmingham.

On March 16, 1953, Kathleen Mary West took out an originating summons under section 23 of the Matrimonial Causes Act, 1950, against her husband, Frederick Raisbeck West, claiming maintenance. Two days later he presented a petition for the dissolution of his marriage on the ground of his wife's alleged adultery. That petition was dismissed on February 12, 1954. On February 15, 1954, the commissioner heard the wife's summons, which had stood over pending the hearing of the petition, and made an order for maintenance.

The husband appealed. The facts and the order made by the commissioner are fully stated in the judgment of Evershed M.R.

C. A.
1954

West
v.
West.

Douglas Draycott for the husband. The commissioner, having found that the husband had reasonable grounds for suspecting that his wife had committed adultery before the finding in the divorce proceedings, should not have made an order for maintenance on the summons. Having regard to the decision in *Allen* v. *Allen*,[1] the husband does not dispute that for the period after the finding in the divorce proceedings, should he fail to maintain his wife, he would have no defence to an application under section 23 of the Matrimonial Causes Act, 1950. The only question is whether the order in the divorce proceedings can be dated back so that, notwithstanding the fact that the husband for that antecedent period has been held to have had a bona fide belief in his wife's adultery, he can be held to be guilty of wilful neglect to maintain. The commissioner was wrong in attributing such retrospective operation to *Allen* v. *Allen*.[1] He should have dismissed the wife's summons.

William Latey Q.C. and *C. A. Beaumont* for the wife. The commissioner was right in making an order for maintenance on the wife's summons. Once he had found in the divorce proceedings that the wife had not committed adultery, it followed that the husband's suspicions in respect of his wife's conduct had at all times been unjustified. The husband's allegation of adultery having been disproved, he cannot rely on the allegation of adultery in the maintenance proceedings for any purpose. [Reference was made to *Bright* v. *Bright*.[2]]

Evershed M.R. This is an appeal from an order made on February 15, 1954, by Mr. Commissioner Rewcastle. The order is in a proceeding between Kathleen Mary West, the wife, and Frederick Raisbeck West, the husband, and is in these terms: "The commissioner having read the affidavit of the applicant and "of the respondent in respect of the originating summons, and "having heard counsel for both parties thereon, pronounced that "the respondent had been guilty of wilful neglect to provide "reasonable maintenance for his wife Kathleen Mary West the "said applicant and condemned the said respondent in the costs "incurred and to be incurred on behalf of the said applicant in "this cause. And it is ordered that the matter be referred to a "registrar of this division for investigation as to the means of "the parties for the amount or reasonable amount of maintenance

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[1] [1951] W.N. 322; [1951] 1 All E.R. 724.

[2] [1953] 3 W.L.R. 659; [1953] 2 All E.R. 939.

"to be paid by the respondent to be determined, and that in "the interim the respondent do pay to the applicant £4 per "week."

The originating summons mentioned in that order was issued on March 16, 1953. At that time there were no proceedings pending for the dissolution of the marriage, but two days afterwards the husband presented a petition seeking dissolution of his marriage on the ground of the wife's adultery with one Eric Nicholls. That alleged adultery was sworn to in affidavit evidence, sworn in March, 1953, upon the originating summons. Having regard to the allegation of adultery in the petition, the application for maintenance under section 23 of the Matrimonial Causes Act, 1950, was, not unnaturally, adjourned until after the hearing of the petition.

On the hearing of the petition on Friday, February 12, 1954, the commissioner found, as a fact, that the wife had not committed the adultery alleged and dismissed the petition. On the following Monday, February 15, this application under the Matrimonial Causes Act, 1950, came on again for hearing. At the beginning of his judgment the commissioner said: "The "husband says, I think perfectly justifiably so, that up to the "decision on his petition for divorce on Friday last he had "reasonable grounds for suspecting that his wife had committed "adultery with the co-respondent in that suit."

In that state of affairs, it was contended on behalf of the husband that, although from February 12, 1954, onwards, it was no longer open to him to say that he reasonably believed his wife to be an adulteress, he was nevertheless entitled, until the finding of fact on February 12, to allege and prove, if he could, such reasonable belief up to that date.

On the other hand, it was contended that *Allen* v. *Allen*,[1] a case in this court, went further, and, in effect, decided that once on the trial of a petition a charge of adultery is rejected, the party alleging it is thereafter estopped altogether from setting up that adultery, or his belief in that adultery, in any proceedings and in relation to any period of time. In other words, the effect of that finding acts retrospectively to disqualify the party against whom the finding operates from asserting that he ever honestly and reasonably believed in the adultery. The commissioner accepted that latter view, and it is from that decision that this appeal is taken.

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[1] [1951] W N. 322; [1951] 1 All E.R. 724.

In my judgment, the commissioner was wrong in the view which he took. *Allen* v. *Allen* [1] was a strange case, or might appear to be so to persons not very well versed in the workings of our system. It was a case in which a wife first had taken proceedings for restitution of conjugal rights against her husband, who, in answer to that petition, pleaded and proved that he had reasonable belief that the wife was an adulteress and so justified his withdrawal from cohabitation. Later, the husband petitioned for the dissolution of the marriage on the ground of her adultery, the reasonable belief in which he had established in his wife's proceedings; but he failed to establish adultery. The question then arose, could the husband still persist in claiming a reasonable belief in the adultery as an answer to proceedings for maintenance by the wife, notwithstanding that his petition had been dismissed? What he said was: "True, I failed to satisfy the onus of proof which "lies upon me of proving adultery, but still I may fairly claim "that I reasonably and bona fide believed that my wife had "committed adultery and, indeed, in a proceeding which she "brought some time earlier it was held that I could reasonably "so believe." This court, however, came to the conclusion that, once there had been a decision on the question of fact whether or not adultery had been committed or had been proved, and that decision was favourable to the alleged adulterer or adulteress, there was no room left for belief. Hodson L.J. delivered the leading judgment, in the course of which he cited with approval a passage from the judgment of Lord Merriman P. in *Everitt* v. *Everitt*,[2] when sitting as president of a division of this court: "In *Wood* v. *Wood* [3] I gave the example of a confession by the "wife of adultery, with every circumstantial detail fully justifying "the husband's belief in the fact that she had committed adultery "and, so long as that belief subsisted, entitling him to withdraw "from, or to refuse to resume, cohabitation. There might, how-"ever, come a moment when, in spite of her confession, or "indeed because of her oath that her confession had been false, "the new statement being supported with equally circumstantial "detail, a judge might hold that not only was the charge of "adultery not proved but that the wife had not in fact committed "adultery. From that moment the fact has been ascertained "and there is no longer any room for the belief; but that"—that is, the ascertainment of the fact—" does not act retrospectively or

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[1] [1951] W.N. 322.

[2] [1949] P. 374, 381; [1949] 1 All E.R. 908.

[3] [1947] P. 103; 63 T.L.R. 450; [1947] 2 All E.R. 95.

"retroactively. So long as the belief is reasonably and properly "held, the husband's conduct, and the parties' respective rights "in relation to cross-charges of desertion are adjudicated on "according to the existence of the belief. There may come a "moment beyond which that is no longer possible."

Hodson L.J. applied that reasoning to the question of maintenance, and there is no doubt that *Allen* v. *Allen* [4] is authority for the view, binding on this court, that a finding that there has been in fact no adultery is conclusive to prevent a husband thereafter trying to establish—and by thereafter I mean in respect of any later period—a bona fide and reasonable belief in the adultery. But the finding does not operate retrospectively to prevent a husband saying: "Until the court so found I believed bona fide "and reasonably that my wife was committing adultery," and for that reason justifying an alleged desertion or failure to maintain.

That being the law, and as the commissioner found as a fact that the husband, until the hearing of the petition, perfectly justifiably took the view that his wife had committed adultery, it seems to me that the husband was entitled to maintain on February 15 that he had an answer to this summons issued in March, 1953, and, therefore, that he was entitled to have the summons dismissed. But, from February 12, he was no longer able to refuse to maintain his wife, at any rate, in the absence of some fresh ground of justification.

In all the events which have happened, it seems clear that, unless he now pays or has paid from February 12 the sum of £4 a week, he will be liable to have a fresh summons issued against him, to which he would have no answer; but that is not what we have to decide. It seems to me that counsel for the husband is entitled to claim that the order of February 15, 1954, was wrongly made, and in the circumstances and on the findings of the commissioner the summons of March, 1953, ought to have been dismissed.

The appeal succeeds, and, accordingly, we order that the summons be dismissed.

DENNING L.J. In order to succeed the wife had to show that before the issue of the summons her husband had been guilty of wilful neglect to provide reasonable maintenance for her. Her husband, however, proved that at all material times before the summons he had reasonable ground for believing her to have been guilty of adultery. That meant that he was not then bound to maintain her and was therefore not guilty of wilful neglect to maintain her. After the hearing of the divorce suit it was another matter. I agree that the appeal should be allowed.

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[4] [1951] 1 All E.R. 724.

HODSON L.J. I agree.

Appeal allowed.

Solicitors: *Underwood & Co. for J. Foley Egginton & Co., Birmingham; Golding, Hargrove & Palmer for D. Wood & Co., Birmingham.*

B. A. B.

STARKEY v. STARKEY.

1954
Mar. 9, 10.

Lord Merriman P. and Sachs J.

Husband and Wife—Maintenance—Justices—Re-hearing—Wife's summons dismissed—Appeal to Divisional Court allowed—Power of justices to ante-date payments on re-hearing as to amount—Committal order for subsequent arrears—Effect of order—Refusal of Divisional Court to order payments prior to date fixed by justices—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 64, 74, 75, 76.

Where the Divisional Court has allowed a wife's appeal against the dismissal by a court of summary jurisdiction of a complaint under the Married Women (Separation and Maintenance) Acts, 1895–1949, and sent the case back to the justices to determine the appropriate amount of maintenance, the justices have power on the re-hearing to date the order for payments back to the date of the decision of the Divisional Court allowing the appeal, and possibly to the date of the original complaint.

But if the justices have made an order for maintenance dating from the re-hearing, and have subsequently made a committal order in respect of arrears accruing since that date, thereby discharging the husband from liability for those arrears, the Divisional Court will not subsequently make an order on appeal ante-dating the order of the justices.

Regina v. *Miskin Lower, Glamorganshire Justices, ex parte Young* [1953] 1 Q.B. 533; [1953] 2 W.L.R. 409; [1953] 1 All E.R. 495 applied.

APPEAL from Kineton justices.

On April 23, 1952, the justices dismissed complaints by the wife that the husband had been guilty of desertion and a wilful neglect to provide reasonable maintenance on March 6, 1952, and dates prior thereto. On February 11, 1953, the Divisional Court allowed the wife's appeal, reversing the dismissal of the complaints in so far as they related to neglect to maintain, and sent the case back to a fresh panel of the justices to assess the amount of maintenance to be paid to the wife. The husband appealed to the Court of Appeal, but his appeal was dismissed. On August 18, 1953, the matter again came before the justices, who made an order for £5 a week, but refused to date the order back, either to April, 1952, or February, 1953, taking the view that they had no power to do so. The wife wished to appeal against the order in so far as it related to the date of the initial payment, but there was a delay arising in part from an error in procedure, and notice of appeal was not filed until December 2, 1953. Leave was given for the appeal to be heard out of time.

The husband, who appeared to be a man of some substance, refused to make any payments under the order, and on January 14, 1954, an application was made for the committal of the husband. On February 24, 1954, following an adjournment, the justices made a committal order in respect of £135 arrears. The order was suspended until March 2, 1954, to give the husband an opportunity to reconsider his position; but he made no payment and on March 2, 1954, he was sent to prison.

Douglas Draycott for the wife. The justices thought that they had no power to order payments to commence earlier than August 18, 1953, the date on which they sat to assess the amount of maintenance to be paid to the wife. In that they were wrong. In fact they had an unfettered discretion and could have ordered payments to run either from the date on which the wife's original complaint had been dismissed, namely, April 23, 1952, or from the date on which the Divisional Court found the wife's complaint to be true and allowed her appeal, namely, February 11, 1953. The appeal is complicated by the fact that in the meantime a committal order has been made in respect of arrears accrued due from August 18, 1953. It is settled by the decision in *Regina* v. *Miskin Lower, Glamorganshire Justices, ex parte Young*,[1] that imprisonment discharges the defendant from liability for the arrears for which he was imprisoned. The husband was contumacious and apparently preferred to go to prison rather than pay. If, therefore, further pressure could be legitimately applied to make him pay in respect of the period prior to August 18, 1953, it was proper that it should be applied; and the fact that the committal order had discharged arrears subsequent to August 18, 1953, should not affect the matter.

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[1] [1953] 1 Q.B. 533; [1953] 2 W.L.R. 409; [1953] 1 All E.R. 495.

The husband did not appear and was not represented, and the court was informed that the prison governor had told the wife's solicitor that the husband had said he was not interested in the appeal.

LORD MERRIMAN P. stated the facts, and said that the husband, who had been able to find money for leading counsel and for the costs of a certain amount of litigation, had refrained from paying a penny to his wife by way of maintenance for quite a long time, and that the court had been advised that he proposed to continue to do so as long as he could keep out of the clutches of the law, and continued: The matter went back to the justices [after the dismissal of the husband's appeal to the Court of Appeal] and came on before them on August 18, 1953. They did not yield to Mr. Draycott's persuasion that they should make the order, which they assessed at the maximum of £5 a week, operative either from the date of the original dismissal by that petty sessional division in April, 1952, or from the date of our order finding the wilful neglect proved, but they made the order run from August 18, 1953. The object of the present appeal is to invite us to make the order retrospective either to April 23, 1952, or February 11, 1953. Mr. Draycott has persuaded me that we should now have power, just as I think the justices would have had power, to make the order operate from one or other of those dates, and certainly from the date when we found the complaint to be true, which is what he is really inviting us to do. As the justices could have made that order, so, on appeal, I think, could we.

But the matter, unfortunately, does not stand in that simple position, because something else has happened meanwhile. [His Lordship referred to the finding on February 24, 1954, that the sum in arrear was £135 plus the court fee of 15s. for the complaint, and said:] The justices expressed themselves satisfied that the non-payment of this sum was due to wilful or culpable neglect and not to absence of means or any excusable circumstances of that nature, and made a committal order against the husband for three months, which will expire at the beginning of June, 1954. They suspended the operation of the committal for a week, to enable him to think it over, but he decided to go to prison rather than pay. He was informed through the governor of the prison about his rights in connexion with this appeal, and it was explained to him, amongst other things, that it was necessary for his wife to ask for an extension of time, for reasons which satisfied us yesterday that it was proper that the time should be extended. He made it perfectly clear that he did not wish to attend, either to dispute the appeal or to resist the extension of time.

Although I see that none of the papers which were used in the case bears any reference on the face of it to the Magistrates' Courts Act, 1952, which came into force on June 1, 1953, the justices must, in fact, have been acting under that Act, and I therefore refer to the provisions of that Act which are applicable to this case. We are assured that the husband made no payment to avoid the enforcement of the committal order, and that he has made no payment since his imprisonment which would operate to reduce the term for which he was committed. As the operation of the warrant was withheld until March 2, 1954, it follows that he is liable to remain in prison until the beginning of June.

It is first of all necessary to recognize what the effect of that term of imprisonment will be on the sum in respect of which the committal was made, namely, the £135 15s. In my opinion that is settled by the decision of the Divisional Court of the Queen's Bench Division in *Regina* v. *Miskin Lower, Glamorganshire Justices, ex parte Young.*[1] Pearson J., delivering the leading judgment in that case, after a full review of the authorities and the Acts of Parliament applicable, said [2] that "imprisonment discharges the defendant from liability for the arrears for which he "was imprisoned." That conclusion was arrived at on the basis that an imprisonment in respect of an order under the Summary Jurisdiction (Married Women) Acts, 1895–1949, being one of the orders enforceable as an affiliation order, stands on a different footing from a maintenance order pronounced by the Divorce Court, which is enforceable as a civil debt (as is shown by *Jinks* v. *Jinks*[3]) and, as such, is covered by the provisions of the Debtors Act, 1869.

In the Magistrates' Courts Act, 1952, in the group of three sections headed "Arrears under Affiliation Order, etc.," sections 74, 75 and 76, which in turn refer back to section 64 of the same Act, it is made clear that payment shall not be enforced "except "by an order made on complaint," and by section 74 (2) the complaint may not be made "earlier than the 15th day after

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[1] [1953] 1 Q.B. 533.

[2] [1953] 1 Q.B. 533, 539.

[3] [1936] 3 All E.R. 1051.

"the making of the order for the enforcement of which it is "made; but subject to this such a complaint may be made at "any time notwithstanding anything in this or any other "Act." That is to give effect to earlier Acts of Parliament which made it clear that the time-limit of six months applicable to the summary jurisdiction procedure did not apply to enforcement of maintenance orders enforceable as affiliation orders.

By section 74 (7) it is provided: "Where on a complaint to "enforce such an order as aforesaid the defendant is not com"mitted to custody, a new complaint may be made on the ground "that the circumstances of the defendant have changed." That is a reproduction of part of section 8 of the Money Payments (Justices' Procedure) Act, 1935, though it does not contain words which were in section 8 (3) of that Act excepting "any part of "that sum remitted under the last foregoing subsection," which enabled justices, I think for the first time, on an application for enforcement, variation, revocation, discharge or revival of a maintenance order, to remit the payment of any sum due thereunder or any part of any such sum. The power to remit is re-enacted in section 76 of the Magistrates' Courts Act, 1952.

Section 75 of the Act of 1952 is also important, and provides: "Where a person is committed to custody under this part of this "Act for failure to pay a sum due under an affiliation order or "order enforceable as an affiliation order, then, unless the court "that commits him otherwise directs, no arrears shall accrue "under the order while he is in custody." The section reproduces an earlier enactment.[4]

The position, therefore, is that as there was no such special order in the present commitment, by serving the term of imprisonment the husband is acquitted of the £135 of arrears in respect of which the commitment was made, and no fresh accumulation of arrears at £5 a week occurs during the term of imprisonment. As regards the future, it is true that any further action will have to await his release from prison; but in respect of any further proceedings it will be possible for a court not merely to make a committal order in respect of arrears which have accrued, but if it thinks fit, to allow further arrears to accumulate during the term of the commitment imposed.

I said earlier in this judgment that I had no doubt that this court could have directed the justices, when we sent the case back in February, 1953, to assess the maintenance as from a certain date, and, in particular, from the date of our order. I about his rights in connexion with this appeal, and it was explained to him, amongst other things, that it was necessary for his wife to ask for an extension of time, for reasons which satisfied us yesterday that it was proper that the time should be extended. He made it perfectly clear that he did not wish to attend, either to dispute the appeal or to resist the extension of time.

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[4] See Criminal Justice Administration Act, 1914, s. 32 (3).

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I said earlier in this judgment that I had no doubt that this court could have directed the justices, when we sent the case back in February, 1953, to assess the maintenance as from a certain date, and, in particular, from the date of our order. I off any portion of the remainder of his sentence at a rate which, in this particular case is, roughly, £10 per week's imprisonment. That option arises under what is now section 67 (2) of the Act of 1952.

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[4] See Criminal Justice Administration Act, 1914, s. 32 (3).

The next point is that, whilst in prison, having regard to the particular order which these justices made on February 24, 1954, no arrears accrue. Thus whilst he is in prison he does not come under any weekly liability. Under section 75 of the Magistrates' Courts Act, 1952, the justices could have ordered otherwise, but they in fact did not.

In those circumstances, the apparent scheme of things under the relevant sections of the 1952 Act and of the other Acts which provide the sanction of committal for arrears, is so worked out that, subject to any order of the court as regards arrears accruing whilst he is in prison, a man shall emerge from his committal free of debt. To put it in another way, once the wife in this case applied for a committal order, and pursued that application to the point of securing an order under the provisions already mentioned, the husband, to adopt a phrase used by Pearson J.,[9] gets, in effect, an option to " work off " his debt by imprisonment.

I, too, wish to refer to another authority cited to this court —*Jinks* v. *Jinks*,[10] decided in the Court of Appeal. All that I desire to mention is that, where an order for committal in respect of maintenance is made by the High Court, then there results a civil debt which is subject to quite a different chain of results. Such a debt is not purged by a committal order, and that, of course, brings into almost startling relief a salient advantage in certain cases of proceeding for maintenance under section 23 of the Matrimonial Causes Act, 1950, as opposed to electing to proceed in a court of summary jurisdiction.

Reverting to the position in the present case, what is the effect of this successful application to commit, having regard to what I have referred to as the scheme of things envisaged by the legislature? It seems to me proper first to consider the position on the footing that this court, despite that committal, has a discretion to make an order creating further arrears, and then also to examine whether in law this court has such a power having regard to that committal order. If we acceded to Mr. Draycott's argument, supported as it undoubtedly is by the merits of the case, what would be the effect? We would now impose a debt for arrears antecedent to those which are in course of being discharged by the committal order. In the result the husband would not emerge free, as the legislature apparently intended that he should. Indeed, he would be liable to committal almost at once for the arrears which we would now impose upon him.

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[9] [1953] 1 Q.B. 533, 540.

[10] [1936] 3 All E.R. 1051.

Further, I cannot overlook the fact that if the justices had acceded to Mr. Draycott's argument on August 18, 1953, or if the wife had come at the earliest reasonable moment to this court upon an appeal, the justices would presumably have had before them upon any committal proceedings on February 24, 1954, the question of all the arrears, including those which we are now asked to impose; and having regard to the general practice in these cases, and to the probable course of events from other angles as well, it seems almost inevitable that the justices upon the committal would have discharged, in effect, those precise arrears which we are now asked to impose.

In those circumstances I am in entire agreement with my Lord that this is a case in which, even if the court has a discretion to create these new and earlier arrears, it should not exercise that discretion. But I am inclined to the view that this court has no such right; in other words, that the discretion does not even exist. For, where the scheme of things as a whole is that a wife applying for a committal order does so on the known footing that an imprisonment, if served, will discharge certain arrears, it seems to me to be wrong that she should then be able, having got that order, to come to this court in order to create some antecedent arrears. It seems to me that these two ways of coming to the courts are in this case inconsistent with each other; and whether one regards it from the point of view of an election of alternative courses or from the point of view which is sometimes called approbation and reprobation, the principles which are inherent, and, indeed, expressed in such well-known cases as *Baxter* v. *Eckersley* [11] and *Dexters Ld.* v. *Hill Crest Oil Co.* (*Bradford*) *Ld.*[12] appear to apply.

In the result, although the husband is contumacious, although he well deserves, upon the matters as known to this court, the imprisonment which he is serving, and although, having no merits, he further deserves to be made to pay all these sums which Mr. Draycott asks us to make him pay—I have come to the

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[11] [1950] 1 K.B. 480; 66 T.L.R. (Pt. 1) 265; [1950] 1 All E.R. 139.

[12] [1926] 1 K.B. 348.

1954

Starkey v. Starkey.

conclusion, in agreement with my Lord, that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *W. Easton & Sons for Geoffrey Parker & Co., Stratford-on-Avon.*

J. B. G.

1954
Mar. 3, 4.

Lord Merriman P. and Sachs J.

SKULL *v.* SKULL.

Husband and Wife—Divorce—Re-hearing—Jurisdiction of Divisional Court—No entry of appearance—No appeal "in ordinary course" to Court of Appeal—Possible "error of the court"—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940), *r.* 36 (1).

Where in the ordinary course a spouse would not be entitled to appeal to the Court of Appeal, the Divisional Court has jurisdiction to hear an application under rule 36 (1) of the Matrimonial Causes Rules, 1950, for a re-hearing of a matrimonial cause heard by a judge alone even though there may have been an error of the court.

A husband filed a petition for divorce on the ground of cruelty and (constructive) desertion. He asked for the discretion of the court. The wife, who was receiving maintenance under an order of justices on the ground of desertion, wished to defend, but she failed to enter an appearance and instead sent to the husband's solicitor a document containing a denial of desertion and an allegation that her husband had deserted her. The case appeared in the undefended list; but although reference was made to the fact that a document had been received, objection was taken to the commissioner's looking at it. The wife had been advised not to attend the hearing by a layman, and did not do so. The commissioner dismissed the allegation of cruelty, but granted a decree on the ground of desertion, and the wife applied to the Divisional Court for a re-hearing under rule 36 (1) of the Matrimonial Causes Rules, 1950:—

Held, that although the trial had been unsatisfactory, and that there might have been an error of the court within the meaning of the rule, the Divisional Court had jurisdiction to order a re-hearing, for this was not a case in which the wife would, in the ordinary course, be entitled to go to the Court of Appeal.

Observations in *Prince* v. *Prince* [1951] P. 71, 81, 85; 66 T.L.R. (Pt. 2) 493; [1950] 2 All E.R. 375 applied.

Application for re-hearing.

The parties were married in October, 1945. In September, 1946, the husband left the matrimonial home and cohabitation

1954

SKULL
v.
SKULL.

was never resumed. On December 18, 1946, the wife was granted an order for maintenance at £1 a week by justices on the ground of desertion, the husband admitting the charge at the hearing of the summons. The husband paid the sum ordered regularly.

In June, 1953, the husband filed a petition for divorce on the grounds of cruelty and (constructive) desertion, and asked the court to exercise its discretion in his favour. The wife acknowledged the receipt of the petition but did not complete the form of appearance. She applied, however, for legal aid; but although she was offered a certificate she did not accept it owing (she said) to a decrease in her means and a consequent inability to afford the contribution. A notice, dated November 9, 1953, was sent to the wife informing her of the date of the hearing on November 17, 1953. Instead of seeking professional assistance she went to a person described in her affidavit supporting this application as an "assessor," who drafted a document which was called "Parti- "culars of Defence," and in which the relevant sentences were: "I deny that I have deserted the petitioner. The facts are that "he deserted me." The document was received by the husband's solicitor on November 16, 1953; but the wife was told by the "assessor" that it would be better for her not to attend the hearing.

The case came before Judge Rice-Jones, sitting as a special commissioner. Attention was called to the fact that a document had been received, but objection was taken on behalf of the husband to the commissioner's looking at the "Particulars of "Defence." The commissioner, however, had the wife's name called, and there was no reply. After hearing the evidence he granted a decree on the ground of desertion in the exercise of his discretion, saying of the charge of cruelty that he did not see how cruelty could possibly be established on the evidence.

The wife applied under rule 36 (1) of the Matrimonial Causes Rules, 1950, for a re-hearing.[1]

William Kee for the wife. The applicant's claim to a re-hearing is based on matters quite unconnected with the course which the hearing in fact took on the material before the commissioner: see *Peek* v. *Peek*.[2] Here, since the applicant was in no way asserting that the court went wrong on the material before it, it could not be said that any error of the court at the hearing was alleged so as to exclude rule 36. The rule was intended to operate in cases in which the parties themselves would not in the ordinary course be entitled to go to the Court of Appeal: *Prince* v. *Prince*.[3] Here the applicant had not entered an appearance, and had no right according to the ordinary general procedure of the Court of Appeal to appeal to that court, and there could be no question therefore of trespassing on the exclusive jurisdiction of the Court of Appeal.

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[1] Matrimonial Causes Rules, 1950, r 36: "(1) An application for re- "hearing of a cause heard by a judge "alone where no error of the court at "the hearing is alleged shall be made "to a Divisional Court . . . ; (2) Any "other application for re-hearing shall "be made by way of appeal to the "Court of Appeal."

[2] (1948) 66 T.L.R. (Pt. 2) 503, 506, 507.

C. L. White for the husband. There are no merits in the present application. The wife had been guilty of culpable delay, had failed to take the advice of competent advisers and had refused legal aid. It was obvious that in making this application she was motivated principally by her anxiety to retain for as long as possible the maintenance order which had been made by the justices. She had not disclosed anything which amounted to a substantial defence to the petition, and the court ought not to grant a re-hearing unless it is satisfied that the respondent has a genuine defence which has some prospect of success. Secondly, if the court below was wrong in refusing to look at the "Particulars "of Defence," or erred in any other respect, then there has been an error in the court below and the present application under rule 36 is misconceived.

Lord Merriman P. This is an application under rule 36 (1) of the Matrimonial Causes Rules, 1950, for a re-hearing of a husband's petition for divorce on the ground of desertion, on which a decree nisi was pronounced by Judge Rice-Jones, sitting as a special commissioner in London. The commissioner exercised his discretion in favour of the husband notwithstanding the husband's admission that he had committed adultery with a certain woman, in terms of the discretion statement which was put in before the commissioner. At the same time, and, apparently, on the same facts, the commissioner dismissed with not inappropriate contempt the charge of cruelty.

The difficulty in this case is that it is an essential condition of the application of rule 36 (1) that no error of the judge at the hearing is alleged, and it has been held repeatedly, and the Court of Appeal has emphasized the point, that "alleged" does not merely mean alleged as a matter of form. One has not merely to look at the notice of motion. It means alleged as a matter of substance. If it is necessarily alleged, if it is a necessary part of the ground on which the retrial is sought, it is "alleged" whether or not it is formally alleged.

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[3] [1951] P. 71; 66 T.L.R. (Pt. 2) 493; [1950] 2 All E.R. 375.

[His Lordship then stated the facts and continued:] I cannot help thinking that even though the objection to the commissioner looking at the document was taken, it might have been wiser for him to look at it to see what the point was; but it was a pure matter of discretion, and I do not consider that, even if it was a mistake which led to the case being proceeded with then, instead of being adjourned to give some opportunity to the wife to put her case before the court, it is a matter which can be criticized on the ground of "error."

The point which has been troubling me throughout this case is one which I think was expressly, at any rate impliedly, left undecided by the Court of Appeal in *Prince* v. *Prince*,[1] that is: What is the situation in regard to the allegation or non-allegation of error within the meaning of rule 36 (1), if a true conclusion about what happened at the trial is that an inference was drawn from undisputed evidence which was not justifiable on the materials before the court? I do not propose to go through the various authorities on this point which were reviewed by the Court of Appeal in *Prince* v. *Prince*.[1] I refer particularly to the part of the judgment beginning with the words [2]: "Before passing . . . ," and going to the end of the judgment, and in particular the passage [3]: "We think there is a difference, albeit a fine one, "between an incorrect selection of conflicting testimony and an "erroneous inference drawn therefrom, and an inference drawn "from undisputed evidence which was justifiable on the materials "before the court, although subsequently proved to be incorrect."

As I am not expressing any concluded opinion about the matter, I will merely point to the circumstances which may be suggested, and, indeed, have been suggested in the present case (which went undefended, and in which the evidence was all on one side and was not disputed), as tending to show that the finding of desertion was not justifiable on the materials before the court, apart altogether from any materials which may be brought before the court on some subsequent occasion. The first circumstance, which is one of very great importance in any desertion case, is that a court of summary jurisdiction has held one or other of the spouses to be in desertion in respect of the very separation which is being considered on the later occasion. In the present case, it was the husband who was held to have been the deserter, and the wife the deserted spouse, in respect of a parting which began by the husband leaving home on September 2, 1946; it is not suggested that any overtures have subsequently been made for a resumption of cohabitation by him: on the contrary, the order has been regularly implemented in favour of the wife by the payment of the £1 a week which the husband was ordered to pay her in respect of the desertion.

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[1] [1951] P. 71; 66 T.L.R. (Pt. 2) 493; [1950] 2 All E.R. 375.

[2] [1951] P. 71, 82.

[3] Ibid. 83.

I am, of course, aware that in *Harriman* v. *Harriman*[4] a full Court of Appeal decided that a finding of a court of summary jurisdiction does not estop the High Court in matrimonial matters. It is, therefore, open to a judge or commissioner sitting in divorce to come to a different conclusion. But I should suppose that it is also beyond doubt that, if desertion is being alleged against the spouse in whose favour an order of justices has been made, although the High Court may eventually take the view that even if the order has never been appealed, it was wrong, that is not the end of the matter. Putting it at the lowest, in considering the vital question of the intention of the wife as respondent to the subsequent petition, it must be a relevant fact that (as in the present case), she is the holder of an order, regularly implemented week by week, declaring her to have been deserted. Even if on a later occasion and on different evidence, a judge of the High Court comes to a different conclusion, or thinks that he would have come to a different conclusion on the former occasion, weight must be attached, in assessing the alleged culpability of the wife who holds the order, to the fact that she does hold an order in her favour, and that it has subsisted during the period of the desertion alleged against her.

That is quite a different matter from saying that the High Court is in any way estopped from finding the opposite on a later occasion. It is giving effect to the continued currency of the order during the intervening period. That was one point which, I think, should have inspired caution on the part of the commissioner. [His Lordship referred to the evidence dealing with the husband's admission of the wife's charge of desertion before the justices in December, 1946, and said that if there had been nothing else he would have taken the view, without expressing any final opinion about the result, that the trial had been highly unsatisfactory, and continued:]

The next criticism is that it was admitted that there was no separate evidence directed to the charge of constructive desertion distinct from that which was pleaded as being directed to the charge of cruelty. Evidence was led to the effect on the mental health of the husband of the various matters alluded to in the petition, to which the commissioner observed: "I do not see "how you can establish cruelty on this. However, ask your "questions," and the questions went on. I do not think it necessary to go through the detail of the other answers. Suffice it to say that it appears to be the case that the commissioner paid no further attention to the charge of cruelty. Evidence was then given of the husband's adultery, which did not, so far as I can detect it, deal even in the slightest degree with the point whether the adultery on the husband's part had or had not affected the wife, or even whether she was or was not aware of it. That point still holds good since it was first laid down in *Herod* v. *Herod*.[5] The judgment of the commissioner was: "I "will grant a decree nisi on the ground of desertion, and exercise "discretion."

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[4] [1909] P. 123.

The point to which I am addressing my mind is this: Here is a case in which the same allegations are put forward as cruelty and as constructive desertion. The cruelty is dismissed. Although the commissioner does not expressly say at the end that he finds the cruelty unproved, he had already said, after hearing the husband's story of the married life, that he did not see how cruelty could possibly be proved; and he pronounced a decree only on the ground of desertion. This appears to raise, in a clear-cut form, the possibility of a misdirection, inasmuch as he does not appear to recognize the recent decision of the Court of Appeal in *Pike* v. *Pike*,[6] in similar circumstances, that in the absence of any other evidence directed to the question of expulsion than an unproved charge of cruelty, the same conduct cannot be dressed up as constructive desertion.

I express no final opinion on these matters, although perhaps I ought to do so, because on one view of the matter it may be thought that a conclusion arrived at by ignoring, on the one hand, the potency of the wife's order and, on the other hand, by the impropriety of using as constructive desertion matters which are put forward as cruelty and rejected as such, when there is nothing else, is so plainly an error of the court at the trial as to take the case out of rule 36 (1).

[5] [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722.

[6] Ante, 81n.; [1953] 1 All E.R. 232.

Mr. Kee has reviewed the decision in *Prince* v. *Prince*.[7] I do not want to press any admission of counsel in a legal argument too far, but he did admit, as I think rightly, that if the true conclusion is that an inference which was unjustifiable was drawn from undisputed evidence on the materials before the court, it is difficult to resist the conclusion that that is error of the court. But he pressed us to rely on the final conclusion of the judgment of the Court of Appeal in *Prince* v. *Prince*,[7] where by way of explanation of the reason for rule 36 (1), the Court of Appeal, after considering the matters about error illustrated by cases, expressed the view that the intention of the rule is " to give or " preserve to a Divisional Court (because of the peculiar public " concern in matrimonial matters) the right to order a new trial or " a re-hearing in cases in which the parties themselves would not " in the ordinary course be entitled to go to the Court of Appeal." I stress the words " in the ordinary course " because they are a repetition of, or allusion to, an earlier passage in the judgment in which Evershed M.R. said[8]: " Having regard to the fact that " the wife [in *Peek* v. *Peek*[9]] did not enter an appearance to " the petition, the case was one in which she could not appeal " in the ordinary course to the Court of Appeal, and therefore " there was no question of trespassing on the exclusive jurisdic- " tion of that court."

I regard those words about appealing " in the ordinary " course," twice repeated, as the governing words in that passage. One may feel that, having regard to the unsatisfactory course that this trial took, and the desirability of clearing up the possible mistakes (I will not say the " error ") which have occurred, the Court of Appeal, as a matter of indulgence, notwithstanding the manifest errors in procedure made by the wife, might have allowed an appeal to be prosecuted. But I do not think that it is our business to investigate whether the circumstances are such that the Court of Appeal might be prepared to consider that the case is exceptional and comes outside the ordinary run. I think that our business is to act on the plain direction that what matters is whether, in the ordinary course, it would be a case in which the wife could go to the Court of Appeal, and about that there can only be one answer. She could not, because of her failure to enter an appearance or to take other steps to put herself right.

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[7] [1951] P. 71, 85.

[8] Ibid. 81.

[9] [1948] P. 46; 64 T.L.R. 429; [1948] 2 All E.R. 297; (C.A.) 66 T.L.R. (Pt. 2) 503.

There remains the other possible solution, indicated by Evershed M.R., where he said [10]: " The question may be asked, what " remedy the respondent spouse has in an undefended case, if he " is precluded from appealing to the Court of Appeal because he " has not appeared in the suit, and is precluded from asking the " Divisional Court for a re-hearing because he cannot say that the " court has not made an error at the hearing." The answer to that question is that he must persuade the Queen's Proctor to intervene. So far as I know, no effort has been made to persuade the Queen's Proctor to intervene in the present case. But the Queen's Proctor might be influenced by the view (and I know that it has happened in past cases [11]) that the whole matter could be dealt with under rule 36.

If I am right in the view which I take of *Prince* v. *Prince*,[12] namely, that in spite of the fact that the very class of case with which we are dealing is impliedly, if not expressly, left open as regards the question whether error of the court is or is not alleged, nevertheless the final conclusion is the one that matters, and if this case answers the test that it is one in which the wife would not, in the ordinary course, be entitled to go to the Court of Appeal, we are on safe ground in employing the rule to put the matter right. On that ground I think that this motion should succeed, and that the decree should be set aside, and a re-hearing ordered.

SACHS J. referred to rule 36, and, after stating the facts, continued: Under rule 36 the court has certain powers, the principles for the application of which have been frequently discussed in judgments. The court does not consider merely the individual merits of the parties, but the interest of the State as well. The power is not confined to cases where there has, in fact, been no service of the petition, or where there has been a procedural irregularity, or where a party has made what might be called a reasonable mistake either as to how to set about defending or as to where to go to defend when the case comes on. It is a power which can be and has been exercised where there has been a deliberate standing by, as in *Winter* v. *Winter*,[13] or, as in a case recently before this court, where the party applying for a re-hearing had actually burnt the petition and thought that the court would never give a decree on such evidence as would come before it.

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[10] [1951] P. 71, 83.

[11] See *Alhadeff* v. *Alhadeff* [1951] W.N. 367.

[12] [1951] P. 71.

[13] [1942] P. 151; 58 T.L.R. 365; [1942] 2 All E.R. 390.

It is, therefore, open to this court to act under its power where the mistake has been a stupid one, as in the present case. In such a case the court can act, with the aid of the fresh material brought before it, upon the general merits and justice of the case, apart from any question of error by the commissioner. Accordingly, I start with the view that there has been a silly mistake by the wife, which resulted in the case going undefended when the husband's right to a decree was really intended to be contested, and that the case is one in which this court would normally order a re-hearing on grounds on which the Court of Appeal cannot so act.

I now turn to the point whether, in the present case, the commissioner was in error, in that he was not entitled to draw from the undisputed evidence the inferences which, in fact, he drew. Both counsel have argued that he was entitled to act upon the evidence before him. I have, however, come to the same conclusions as my Lord, and thus decide this matter on the footing that the commissioner was in error—but an error which neither in form nor in substance has been alleged by the wife, nor one which, to use words appearing in the judgment in *Prince* v. *Prince*,[14] is necessarily alleged in order to secure the wife her relief under rule 36.

That leads me to the final point. There having been such an error on the part of the commissioner when he heard this case, the question follows whether for that reason this court ought not to act under rule 36 (1). The history of rule 36 and the principles which lie behind it have been discussed and set out in *Prince* v. *Prince*.[14] In that case references were made to the anxiety which my Lord has expressed in previous cases that this court should be careful to avoid any semblance of trespassing on the exclusive jurisdiction of the Court of Appeal, and the court dealt with the distinctions which relate to whether or not an error is being alleged. After posing the question whether, in dealing with an application relating to a case contested at the original hearing, this court had imposed too strict a limitation on itself in *Petty* v. *Petty*,[15] the Court of Appeal finally concluded in *Prince* v. *Prince*[16] (where the original hearing had also been contested) that on the facts in that case an error of the

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[14] [1951] P. 71, 84.

[15] [1943] P. 101; 59 T.L.R. 385; [1943] 2 All E.R. 511.

[16] [1951] P. 71.

1954

SKULL
v.
SKULL.

Sachs J.

court was necessarily being alleged, and it followed that the matter was one for the Court of Appeal, and not for this court.

The point which does not, to my mind, appear to be dealt with in *Prince* v. *Prince* [16] is the position when an applicant has two separate points on which he can rely—the first being one on which the Court of Appeal can act but this court cannot, the second being one upon which this court can act and the Court of Appeal cannot. I venture to think that this question is left open in *Prince* v. *Prince*,[17] where reference is made to the point being similarly left open in *Peek* v. *Peek*.[18]

The position of there being two separate points may arise, first, where there has been no appearance entered by the applicant before trial, and secondly, when there has been such an appearance entered. The case which we are now deciding was one in which no such appearance was entered. On that I agree with my Lord, and take my stand, so to speak, on that portion of the judgment in *Prince* v. *Prince*,[19] where Evershed M.R. states that he is referring to cases "in which the parties them-"selves would not in the ordinary course be entitled to go to the "Court of Appeal." The present is such a case, and I agree with my Lord that there is, therefore, nothing to prevent our acting under rule 36 (1).

That leaves open (and I express no opinion on it) a question which may be of particular importance as regards undefended cases where there has been an appearance. When there are then two separate points of the type to which I have referred, and perhaps the point which can be dealt with by this court is short and clear, and the point which lies within the jurisdiction of the Court of Appeal may not be so short and clear, is the applicant debarred by the existence of the Court of Appeal point from coming to this court? That must be decided when it arises. In the present case the application, in my view, should be allowed.

Application allowed.

Solicitors: *Edward Fail & Co.; Jordan & Lavington.*

J. B. G.

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[16] [1951] P. 71.

[17] Ibid. 82.

[18] 64 T.L.R. 429; [1948] 2 All E.R. 297.

[19] [1951] P. 71, 85.

1954
May 12.

Sachs J.

AMMAR *v.* AMMAR.

Legal Aid—Costs—Divorce—Attendance of respondent at hearing—Respondent resident abroad—Payment on account of disbursements for his attendance—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *Sch. III—Legal Aid (General) Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *reg.* 14 (6A)—*Legal Aid (General) (Amendment No.* 1) *Regulations,* 1954 (*S.I.* 1954, *No.* 166), *para.* 23—*Legal Aid Scheme,* 1950, *para.* 33.

Practice — Evidence taken before trial — Divorce — Husband respondent resident in Cyprus—Application for his evidence to be taken before special examiner there.

A husband respondent in a divorce cause who had obtained a legal aid certificate was resident in Cyprus. He applied for leave to have his evidence taken before a special examiner in Cyprus. The wife, who alleged cruelty, opposed the application:—

Held, (1) That in view of the charges made it was essential for the husband to be present at the hearing if justice was to be done between the parties.

(2) That the expenses of the husband attending the hearing were in the circumstances allowable on a taxation under the Third Schedule of the Legal Aid and Advice Act, 1949.

(3) That the combined effect of regulation 14, paragraph 6A, of the Legal Aid (General) Regulations, 1950 (as amended in April, 1954), and of paragraph 33 of the Legal Aid Scheme, 1950, was to enable the husband's solicitor to obtain in such a case an absolute assurance that the expenses of the attendance would be allowed on taxation, and to enable him to obtain a payment on account of the disbursements to be incurred.

SUMMONS (adjourned into court).

The parties were married in 1949 in London; the husband was then domiciled in Egypt. The parties went to Cyprus, but later in 1949 the wife came to London and the husband followed her. Early in 1950 he returned to Cyprus, where he remained. The wife continued to live in England.

In April, 1952, the wife filed a petition for divorce in the High Court on the ground of cruelty. The husband defended the suit, although he himself remained in Cyprus; and the petition was dismissed on the ground that the wife had not at the relevant time been "ordinarily resident" for three years in England within the meaning of section 18 (1) (*b*) of the Matrimonial Causes Act, 1950. The commissioner who tried the case, however, reviewed the facts and expressed a view that the wife had failed upon the evidence which was given to establish a charge of cruelty.

In May, 1953, the wife filed a further petition for divorce under section 18 (1) (*b*), and again alleged cruelty. The charges were not confined to those previously made. The husband was granted a legal aid certificate and filed an answer denying the allegations, and prayed for a decree of restitution of conjugal rights. Application was made on summons on his behalf for his evidence to be taken in Cyprus before a special examiner, and the application was opposed.

H. D. Baskerville for the husband.
J. M. Asher and *Stanislaus Seuffert* for the wife.

Argument was heard in chambers.

Cur. adv. vult.

May 12. Sachs J., reading his judgment, stated the facts and, after observing that the views expressed by the commissioner constituted no estoppel, continued: Having read the allegations [in the pleadings] and being mindful of the matters which are in issue upon the cross-prayers, it seems to me that there could not frequently be a case in which it is more essential for a respondent husband to be present in court if justice is to be done between the parties. A great deal must necessarily depend upon the impression which the court obtains of the weight of the husband's evidence as assessed upon watching him when it is given in court and he is there cross-examined. In the above circumstances the court would be most reluctant to allow a husband who is in the position to come to this country from Cyprus to give his evidence before a special examiner. The duty of forming an impression of the weight of his evidence cannot be delegated to such an examiner.

The sole ground upon which the husband applies to have his evidence taken before a special commissioner relates to his means and his lack of ability on that ground to come to this country. The husband is an assisted person and has obtained a legal aid certificate under those general regulations made pursuant to the Legal Aid and Advice Act, 1949, which relate to persons resident outside the United Kingdom. Accordingly, I must, and do, assume that before this certificate was granted the machinery for investigating the husband's means was used and was effective: if so, it would follow that his means are such as would warrant this certificate being granted, and that the allegation that he is unable to find the money to come to this country is probably accurate. There is, in the affidavits filed, no suggestion that if money were available he would be either unwilling or unable to come here for the purpose of the trial.

There thus arises the question as to what is the proper course to pursue in a case where the husband is an assisted person outside the country who wishes that his evidence be put before the court, and on one side the wife can properly object that justice might well be denied her if the husband's evidence is adduced otherwise than by being given orally before the trial judge, who could watch the effect of cross-examination, but on the other, the husband can properly assert that justice might well be denied to him if his evidence is not put before the court, and can also truly say that through lack of means he is unable to attend there.

It is on this question that counsel for both sides at the conclusion of argument asked that the application be adjourned into court as one raising points or questions of general interest.

The first point that arises is whether the expenses of the husband attending court in such a case are allowable on a taxation under the Third Schedule to the Act of 1949, which provides that the costs are to be taxed " according to the ordinary " rules applicable on a taxation as between solicitor and client " where the costs are to be paid out of a common fund in which " the client and others are interested:" That point was considered in *Gibbs* v. *Gibbs*,[1] where Havers J., following *Harbin* v. *Gordon*,[2] ruled that such expenses are normally allowable as costs on such a taxation. With that ruling I respectfully agree. I adopt it as my own and propose to proceed upon the footing that it is right.

In the present case the husband is clearly a vital witness. The only unusual aspect of the matter is that he lives in Cyprus. On the facts of this case that aspect in no way alters the position that his presence in court is vital.

What, then, is the effect of the legal aid system? The legislature having by section 12 (3) (*a*) (i) of the Act of 1949 and the subsequent General Regulations of 1950 made thereunder, provided that legal aid be available to persons resident abroad, it is clear that it was intended that to those eligible for such assistance justice should not be denied. It must be assumed that it was envisaged that costs of some magnitude might be incurred in attaining that end, and that it was realized that those costs might well fall upon the legal aid fund. It follows that the present case is one in which it is proper that this should happen.

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[1] [1952] P. 332, 367; [1952] 1 T.L.R. 1143; [1952] 1 All E.R. 942.

[2] [1914] 2 K.B. 577.

The next point which arose was whether there exist provisions which could in a proper case ensure that the husband would without doubt be entitled to his expenses, and also that those expenses be provided in advance of his journey. If not, the object of granting him legal aid might well be frustrated, as he would be in the position of merely having a potential right to reimbursement of expenses which he had not the requisite means to expend.

Fortunately, there came into force on April 27, 1954, the amendment of General Regulation 14, by which there was inserted into it paragraph 6A.[3] [His Lordship read the paragraph, and continued:] That new paragraph is specifically designed to meet contingencies such as here arise. It enables the assisted person to obtain from the area committee an absolute assurance that the expenses will be allowed upon taxation.

Once that assurance has been obtained the solicitor to the assisted person can invoke paragraph 33 of the Legal Aid Scheme, 1950.[4] [His Lordship read the paragraph, and continued:] In this way the Legal Aid Act machinery puts, as it intended, the assisted person in the same position as a person having adequate but not extravagant means with which to defend himself in the courts of this country in accordance with normal practice here, and also ensures that he may similarly assert his rights here. Any husband having such adequate means would

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[3] Legal Aid (General) (Amendment No. 1) Regulations, 1954, para. 23: "Regulation 14 shall be "amended as follows—(1) There shall "be inserted after paragraph (6) the "following new paragraph which shall "stand as paragraph (6A): '(6A) "'Where it appears to the assisted "'person's solicitor necessary for the "'proper conduct of the proceedings "'for any act to be done, but that "'the act is either unusual in its "'nature or involves unusually large "'expenditure, he may request the "'appropriate area committee to "'obtain The Law Society's prior "'approval of the act, and, where "'such prior approval has been "'obtained, no question as to the "'propriety of the act shall be "'raised on taxation as between "'solicitor and client in accordance "'with the provisions of the Third "'Schedule to the Act.'"

[4] Legal Aid Scheme, 1950, para. 33: "(1) A solicitor acting for an "assisted person may apply to the "appropriate area committee for the "payment of a sum on account of "disbursements incurred or to be "incurred in connexion with the "proceedings to which such person's "certificate relates.

"(2) On considering such application the area committee may authorize the immediate payment to such "solicitor out of the Legal Aid Fund "of the amount applied for or of "such other sum as they consider "appropriate in the circumstances."

1954

AMMAR
v.
AMMAR.

Sachs J.

undoubtedly travel to England, first, to defend himself against attacks such as are being made upon this husband, and which he has so far successfully resisted, and, secondly, to assert his own claims.

It follows that in the present case it is not necessary to deny justice to either party and that an order for the examination of the husband before a special examiner should be refused. If the husband wishes to attend court, the legal aid machinery is available by which the means for his attendance can be adequately provided. If, on the other hand, he does not wish to attend court, there is no reason why an order should be made to which the wife can properly object. The application is accordingly dismissed.

In view of the expense which may fall on the Legal Aid Fund I assume that in all the circumstances a careful further check of the husband's financial situation will be obtained by the appropriate committee of the Law Society.

On ancillary matters I would mention that by consent there was put before me an application by the wife to take certain evidence of another witness before a special examiner in Cyprus; this was an application intended to be effective only if the husband was there examined pursuant to the application which I have just dismissed. Accordingly this application of the wife falls to the ground.

Applications dismissed. Cost of applications to be wife's costs in cause. Certificate for counsel.

Solicitors: *Bischoff & Co.; Paisner & Co.*

J. B. G.

1953
Oct. 22.

Lord Merriman P., and Collingwood J.

ROBERTS *v.* ROBERTS.

Husband and Wife—Maintenance—Justices—Adultery by wife—Evidence—Discharge of order—Evidence of association before order—Estoppel—Res judicata—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7.

Where a husband seeks to revoke an order of justices in favour of his wife on the ground that since the making of that order the wife has committed adultery, the husband is not confined in support of that allegation to evidence all of which is new since the making of the order. Evidence of the nature of the association before the making of the order is not excluded, even though the husband then believed that he could establish prior adultery, but allowed the order to be made without raising that issue.

Ramsdale v. *Ramsdale* (1945) 173 L.T. 393 applied.

An order was made in favour of a wife in 1950 on the ground of wilful neglect to provide reasonable maintenance. Although the husband then had knowledge of the wife's association with another man, and believed that he could establish adultery with him since at least 1945, he stood by and allowed the order to be made without raising that issue. The association continued and the spouses did not resume cohabitation; and in 1953 the husband succeeded in getting the order of 1950 revoked on the ground of adultery with the same man subsequent to the date of the order. Evidence was given before the justices of certain matters before 1950 (as well as after) which satisfied the justices that the association was adulterous before the date of the original order:—

Held, that the justices rightly rejected a submission that evidence tending to show an adulterous association before 1950 was inadmissible on the ground that such evidence was available and should have been produced at the 1950 hearing.

APPEAL from a decision of the Liverpool City justices on February 2, 1953.

The justices gave the following reasons, which include a statement of the facts, for their decision:—" This is an application " by the husband for a discharge of a wife's maintenance order " on the ground that his wife has committed an act of adultery " since the making of the order on November 14, 1950. The " maintenance order was made on the wife's complaint of wilful " neglect to provide reasonable maintenance for her, and the " husband was ordered to pay 20s. weekly. Another complaint " on the ground of desertion was before the court on November " 14, 1950, and was withdrawn by the complainant.

" The solicitor for the wife submitted that evidence by the " husband tending to show an adulterous association by his wife " prior to the making of the maintenance order was inadmissible " on the ground that such evidence was available and should " have been produced at the hearing on November 14, 1950. " Our attention was not drawn to any cases in support of " this contention and we are of opinion that in an application " of this nature such evidence is not inadmissible merely because " it was available but not produced at the last hearing.

" The husband gave evidence that between the period 1945 to " 1950 he saw Canavan in his wife's room on two occasions and " also on a third occasion, while she was still in her night attire, " a man's suit was on her bed and one of the pillows was greasy "and dirty. The wife denies these allegations; but she does "admit under cross-examination that on two occasions her "husband has accused her of committing adultery. The evidence "of Josephine McCarthy that the wife and Canavan were on "friendly terms during this period supports the husband's "evidence. On considering the evidence of the parties referring "to this period we believe the husband, and there is no doubt in "our minds that an adulterous association existed between the "wife and Canavan prior to the making of the court order.

"In considering the evidence of meetings between husband "and wife subsequent to November 14, 1950, we attach great "importance to the meeting following the issue of a summons for "wife maintenance arrears when the husband asked his wife "why she had issued a summons while she had another man "keeping her. This was the meeting which the husband states "was in the presence of a nephew of the wife. The wife denies "her husband's allegations about this meeting, though she does "admit losing her temper, but for a different reason from that "alleged by her husband. Of the two accounts given we believe "that the husband's version is true, and that in consequence of "the issue of the summons for arrears a meeting did take place "at which the wife, in the presence of another person, did not "deny that she was living with another man, who she admits "is still living in the house.

"The evidence of John Leonard Phillips gives us little assistance in deciding the case.

"In considering the whole of the evidence in this case we "are forced to the conclusion that the wife's association with "Canavan continued after the making of the maintenance order "and that she has committed adultery with him subsequent to "the making of the order.

"We accordingly discharge the order."

The wife appealed.

F. J. Nance for the appellant wife. The husband relied in support of his charge of adultery since the order of 1950 upon evidence tending to establish adultery before the date of that order. But he was aware at that date of the previous association; and once the order had been made could not adduce that previous association as "fresh evidence" within the meaning of section 7 of the Summary Jurisdiction (Married Women) Act, 1895, in support of an application to discharge the order. It is submitted that the words "upon fresh evidence" in the section are applicable to the whole of the section, and that the husband should not be allowed to adduce evidence now which he failed to adduce in 1950, although it was then in his power to do so. He must rely solely upon evidence of the wife's conduct after the date of the order in seeking to show that she has committed adultery since then.

Ramsdale v. *Ramsdale* [1] is not conclusive against the submission that the previous conduct cannot be relied on, for in that case the husband had not stood by at the first hearing but had tendered evidence of association, although that evidence had not been held to establish adultery. The question whether such evidence might fail to amount to "fresh evidence" upon which the justices could act was not considered.

[*Johnson* v. *Johnson*,[2] *Timmins* v. *Timmins*,[3] *Underwood* v. *Underwood* [4] and *In re Wakeman, Wakeman* v. *Wakeman* [5] were also referred to.]

P. R. Pain, for the respondent husband, was not called on.

LORD MERRIMAN P. This is a wife's appeal from the decision of the Liverpool City justices, who, on February 2, 1953, discharged an earlier order made in the same court on November 14, 1950, whereby they had made an order in her favour for 20s. a week on the ground that the husband was proved to have been guilty of wilful neglect to provide reasonable maintenance for her. The husband's present application was to discharge that order on the ground that the wife had, since the making of the order, committed adultery; and the justices discharged the order on that ground.

It is clear that at the time of the making of the original order the husband had knowledge of his wife's association with a particular man. It is clear, also, that he believed that that knowledge was sufficient to prove adultery. It is also clear that he did not raise that issue at the time of the making of the order. If he had done so, and if the justices had found that the association with this man was and had been an adulterous association, they would have had no jurisdiction to make the order in favour of the wife, because section 6 of the Summary Jurisdiction (Married Women) Act, 1895, which is the original

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[1] (1945) 173 L.T. 393.

[2] [1900] P. 19; 16 T.L.R. 26.

[3] [1919] P. 75.

[4] [1946] P. 84; 62 T.L.R. 18; [1945] 2 All E.R. 561.

[5] [1947] Ch. 607; 63 T.L.R. 396; [1947] 2 All E.R. 74.

Act in the code under which justices act in these matters, says that "no orders shall be made under this Act on the application "of a married woman if it shall be proved that such married "woman has committed an act of adultery . . ." A proviso that does not apply if the husband has "condoned, or connived "at, or by his wilful neglect or misconduct conduced to such "act of adultery" follows. In other words, the husband at that time allowed the order to be made without raising that issue. He stood by. Manifestly, if he had tried to get leave to appeal out of time against that order, he would have been confronted by that very difficulty, that he had stood by. It is not necessary to decide what would have happened. He is to be assumed for the purposes of this case to have known all that it was relevant for him to know at the time the original order was made.

The present application is made under section 7 of the Act of 1895.[1] Now there are two parts of that section. The first enables the court in which the original order was made, on the application either of the married woman or the husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, to alter, to vary or to discharge such an order, and they may, upon such application, increase or diminish the amount of any weekly payment to be made, provided that the top limit is not exceeded. There has been a modification of that part of the section, inasmuch as by a later Act,[2] in dealing solely with increase or diminution of the amount, the words "upon fresh evidence," with their well-known significance, are no longer to apply. But those words apply to any other attempt under that part of the section to vary, alter, or even to discharge any order; and the words "upon fresh evidence," as has been said over and over again, mean evidence of something which has happened since the former hearing, or has come to the knowledge of the party applying since the hearing and could not by reasonable means have come to his knowledge before that time.

In contrast with that part of the section the concluding words of the sentence under which this present application is made read as follows:—" If any married woman upon whose application an " order shall have been made under this Act "—(or other Acts mentioned in the schedule)—" shall voluntarily resume cohabi- " tation with her husband, or shall commit an act of adultery, " such order shall upon proof thereof be discharged."

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[1] Summary Jurisdiction (Married Women) Act, 1895, s. 7: "A court "of summary jurisdiction . . . may, "on the application of the married "woman or of her husband, and upon "cause being shown upon fresh evi- "dence to the satisfaction of the court "at any time, alter, vary, or discharge "any such order" (made under the Act). ". . . If any married woman "upon whose application an order "shall have been made under this "Act, . . . shall voluntarily resume "cohabitation with her husband, or "shall commit an act of adultery, such "order shall upon proof thereof be "discharged."

[2] See Money Payments (Justices Procedure) Act, 1935, s. 9.

There are striking distinctions between the two parts of the section. In the first half the jurisdiction of the justices is discretionary and permissive, and, incidentally, that jurisdiction, so far as alteration of the amount of an order is concerned, is no longer affected by the words " upon fresh evidence," although those words apply to every other sort of alteration, variation or discharge dealt with in that part of the section. But in the sentence with which we are concerned the making of the order of discharge is mandatory if either of two things is proved to have happened: either if it is proved that since the making of the order the wife has resumed cohabitation with her husband, or that since the making of the order she has committed an act of adultery. It is quite plain that the act of adultery referred to must be one which has been committed since the making of the order, because it relates to the discharge of an order " which shall have been made " on the application of a wife.

In this case the evidence adduced before the justices in support of the charge that since the making of the order the wife has committed an act of adultery begins with the evidence of the association between the wife and the man mentioned in the husband's evidence, of which he knew before the order was made. His case was that, when he was demobilized in 1945 and went home, he found a state of things prevailing which satisfied him that his wife was living in the matrimonial home with the man concerned. Without going into unnecessary detail, he gave evidence of circumstances which included finding the man asleep in bed on one visit when the wife came to the door to let him in with an overcoat, or similar clothing, over her night-dress; and there was evidence of her having said something to indicate that she was carrying on an association with this man. That evidence, which was available at the time of the first hearing, was given on this occasion, but it was supplemented by the further evidence that the man in question had continued to live in the same house as the wife, in circumstances which gave ample opportunity of indulging a guilty affection, if that was the relationship between the parties. Now, that part of the story manifestly could not have been given at the time of the first hearing, for it then lay in the future; but it was to the association as a whole that the husband asked the justices to look in deciding whether even, maybe, on the night before the complaint, adultery was being committed by his wife with a man for whom it was alleged she had had a guilty affection even before the husband came home from the war in 1945. There was an additional piece of evidence. The wife admitted that she had only obtained the earlier order at the instance of the National Assistance Board, because she was drawing national assistance. Since the making of the order she had tried to enforce arrears under the same pressure, and on that occasion the husband had made some remark to her, in the presence of a nephew who was also living in the same house as the wife, that she " had a nerve " to try to enforce orders against him when she was living with and being kept by this other man. The evidence, which has been accepted, is that she made no protest against that remark, and that the nephew said something to the effect that it was no business of his. In other words, for what it was worth (and I think that it was worth something, in the circumstances), she stood by when she knew, as she admitted to the justices, that her husband was accusing her of continuing an adulterous association, and made no attempt to deny it.

We are faced with the argument that because the words "upon fresh evidence," with the implication which has been attached to them, are used in the first part of section 7, they must be read into and imported into the latter part of the section, with which we are dealing. We have asked in vain for any authority for that proposition. None has been forthcoming, in spite of the very careful argument which has been addressed to us by Mr. Nance.[3] Moreover, I doubt very much whether the draftsman would have been very artistic if he had actually put the words into the second part of the section, because the very matters with which he is dealing—resuming cohabitation after an order, and committing adultery after an order—must, in the nature of things, be matters which have freshly happened since the making of the order. What is really argued is that though the act of adultery on which it is sought to rely is itself a fresh act, it can only be proved by evidence all of which is new since the making of the order. I am unable to accept that proposition, and, indeed, in my opinion it is a proposition which flies in the face of an authority by which we are bound, *Ramsdale* v.

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[3] The construction of the section is also considered in *Brammer* v. *Brammer* [1954] 1 W.L.R. 599; [1954] 1 All E.R. 649, in which *Natborny* v. *Natborny* [1933] P. 1; 48 T.L.R. 490 was considered.

Ramsdale,[4] which was a decision of this court in 1945. I will read part of the headnote: "The wife applied to the justices "for an order on the ground of her husband having deserted her, "and an order was made in her favour on March 11, 1942. In "1945, the husband applied to the justices to discharge the order, "on the ground that since it was made the wife had been "guilty of adultery. This charge was based, first, on the "suggestion that she was conducting, and, indeed, continuing, "an adulterous association with a named man." I need not deal with the second ground, which depended upon venereal disease. "Held, (1), it was clear that what the justices had to deal with "was the question: Aye or no, had adultery been committed "since the date of the making of the order? But that did not "mean, and should not be taken to mean, that that excluded "evidence of the nature of the association between the wife and "the man named before the making of the order." That part of the headnote is taken from my own judgment. I do not propose to read my judgment, but in my opinion a short passage from the judgment of Wallington J. puts the matter, if I may say so, so neatly, and so completely covers the case with which we are dealing, that I adopt it as part of my judgment in this case. He said [5]: "I do think it is desirable that emphasis should "be placed upon the impossibility of dealing with a case of this "kind, where the inference of adultery, if it is to be drawn at "all, must depend upon proof of inclination and opportunity"—(I am missing out words which do not matter to my present purpose)—"unless the whole of the story is told almost from "beginning to end. It is quite conceivable that you might have "a case in which the whole of the evidence of inclination is "founded upon facts that took place before the original hearing, "and the whole of the evidence of opportunity is founded upon "facts that are proved to have taken place after the original "hearing, so that you get one half of the case before and the "other half after the original hearing. Therefore, it is obvious in "a case of that sort that if you only have evidence of the facts "that have taken place after the original hearing you could not "hope to make out a proper case."

Although it is true that in this case there is some evidence of the guilty affection after the hearing, and some evidence of opportunity before the original order, that passage, in my opinion, is decisive of the issue in this case. This appeal fails, and should be dismissed.

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[4] (1945) 173 L.T. 393.

[5] Ibid. 395.

1953

ROBERTS v. ROBERTS.

COLLINGWOOD J. I agree. The issue here under section 7 of the Act of 1895 is whether adultery has been committed since the order, not upon any specific occasion but at any time since the order. Direct evidence of such adultery is not required in such a case any more than it is in any other case. The question is: can the commission of adultery be inferred from circumstances which lead to it, by fair inference, as a necessary conclusion? Those circumstances must include a large number of matters, familiarity, suspicious conduct, admissions and the like. But the inquiry covers the whole association between the parties, as forming the background against which the significance of the acts of the parties is to be judged. In my opinion the order of the court does not, and cannot, be taken to amount to an oblivion of all that has gone before. And that is what we have been asked to say.

In my opinion, as my Lord has said, this case is covered by *Ramsdale* v. *Ramsdale*.[6] The quotation of the President's judgment in the headnote and the part of the judgment of Wallington J., to which my Lord has referred, entirely cover the facts in this case; and I would only add this, that I share the President's difficulty in importing the requisite of fresh evidence into the final part of section 7 of the Act of 1895 in regard to matters which, ex hypothesi, cannot take place until after the making of the order.

I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Dubovie, Freeman & Co. for A. D. Abrahamson & Co., Liverpool; Helder, Roberts & Co. for John A. Behn, Twyford & Reece, Liverpool.*

J. B. G.

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[6] 173 L.T. 393.

1954
May 26.

Sachs J.

SELF *v.* SELF.

Legal Aid—Costs—Taxation—Barrister—Brief fee—Case heard out of London—Availability of local counsel—Employment of London barrister—Appropriate fee—Undefended divorce case—Legal Aid and Advice Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 51), *s.* 6 (4), *Sch. III.*
Barrister—Fees.

It is not a proper exercise of judicial discretion so to assess the fees of counsel upon a taxation under the Third Schedule of the Legal Aid and Advice Act, 1949, as to deprive those who do such work under the Act of the 85 per cent. of that fair and reasonable remuneration which is provided by the Schedule.

A registrar has no right in effect to dictate to litigants that their choice of counsel in a High Court matter shall be restricted to a relatively small number. Such a restriction is contrary to the principle that an assisted litigant should be put upon the same footing as one who is unassisted.

On a taxation under the Third Schedule of the Legal Aid and Advice Act, 1949, counsel's fee in an undefended divorce suit heard at Brighton was reduced from seven guineas to five guineas. (No question arose concerning the conference fee.) Counsel's chambers were in London and the district registrar indicated that as there were counsel with chambers in Brighton it would be wrong to allow a fee on the basis that counsel had come from London:—

Held, that the registrar had failed to exercise a judicial discretion and that the proper figure to allow as the brief fee was seven guineas.

Per curiam: Whether or not the counsel practising in Brighton constitute a local Bar for purposes such as the County Court Rules is irrelevant. Petitions for divorce are not heard in the county court; they are heard in courts which constitute part of the High Court.

SUMMONS for review of a taxation by the Brighton district registrar.

On November 17, 1953, counsel with chambers in London appeared for a petitioner in an undefended divorce suit heard in Brighton. On the taxation under the Third Schedule to the Legal Aid and Advice Act, 1949, the fee on brief was reduced from seven guineas to five guineas. Objection to the taxation was primarily taken on the ground that it had been ascertained that the fee had been cut down owing to the belief of the district registrar that there had in fact been established in Brighton a local Bar. Leave was given, after reference to R.S.C., Ord. 65, r. 27 (42), to read evidence on affidavit to show that no such local Bar was recognized by the South Eastern Circuit and that there were only three counsel with chambers in Brighton. The district registrar commented on the objection that it was very usual to allow a fee of five guineas in straightforward undefended cases, as was done in this case, and continued: "Whether or not there is technically "a local Bar has no bearing on the matter. The fact is that there "are counsel with chambers in Brighton willing to accept briefs "of this kind, and consequently there is no justification for "allowing an increased fee simply on the grounds that counsel "is necessarily faced with the inconvenience of travelling from "London."

J. E. S. Simon Q.C. and *R. T. Barnard* for the petitioner. The taxing registrar has acted upon a wrong principle in basing his taxation upon the fact that there are counsel with chambers in Brighton. With the exception of matrimonial causes conducted by the Divorce Department of the Law Society, an assisted person is entitled to choose any solicitor and, if appropriate, any counsel, from the appropriate panel. See section 6 (4) of the Legal Aid and Advice Act, 1949.[1] One of the results of the district registrar's ruling, if it were to be accepted, would be that the choice of counsel would, in effect, be restricted to a small rota chosen by an official, for the litigant would be unable to choose his counsel from outside the locality.

The only limitation in respect of counsel's fee is that in paragraph 1 of the Third Schedule to the Act, whereby the sum allowed to counsel " shall be 85 per cent. of the amount allowed " on taxation of the costs." If five guineas were allowed to counsel with chambers in the locality, it would be reasonable to allow a higher fee for counsel who have had to travel there from London. Different circumstances might perhaps arise in cases where counsel has travelled to a town like Liverpool or Birmingham, where there are a large number of counsel. [Sachs on Legal Aid, pp. 17, 135 and 138, was also referred to.]

[In connexion with the question whether or no there was a local Bar at Brighton, reference was made to item 28 of Appendix B to the County Court Practice, 1953 (p. 762), and to the Annual Statement of the Bar, 1909, p. 5.[2]]

[SACHS J. The question of whether or no there is a local Bar does not arise in a High Court matter.]

SACHS J. This is a summons to review a decision of the Brighton registrar on objections lodged when he, upon a taxation under the Third Schedule to the Legal Aid and Advice Act, 1949, reduced the brief fee of counsel, who came from London, from seven guineas to five guineas, on a petition heard at Brighton by a special commissioner exercising High Court jurisdiction.

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[1] Legal Aid and Advice Act, 1949, s. 6 (4): " Where a person is entitled " to receive legal aid, the solicitor to " act for him, and, if the case requires " counsel, his counsel shall be " selected from the appropriate panel, " and he shall be entitled to make " the selection himself. . . ."

[2] " The Council consider that in " order to constitute a 'local bar' " . . . it is reasonable to require that " not less than four practising mem" bers of the Bar willing to accept " briefs in the county courts should " occupy chambers in the locality." (See also Annual Practice, 1949, p. 3698.)

When the summons first came before me it was apparent that the issue here raised might affect many other cases, and accordingly it was adjourned into court. Steps were taken to enable those concerned with the protection of the Legal Aid Fund to be represented, but in fact nobody has appeared to deal with the matter in that behalf; indeed, there is nothing at present in the rules which technically enables them to appear. On the other hand, I have had the advantage of an argument from Mr. Simon in which, with his usual fairness, he has put before me the aspects of the case which might have been argued on behalf of the Legal Aid Fund. I have also had the benefit since the matter originally came before me of assistance from experienced taxing officers of this court.

For the purpose of this judgment I am assuming that the registrar at Brighton was right when he said that the case involved no unusual complications and might be regarded as one of a normal type. The position as regards counsel's brief fees on such undefended petitions heard in London is that no one has been able to inform me of any case on which, on a taxation under the Third Schedule to the Act of 1949, a lesser sum has been allowed than five guineas. Further, no one has been able, despite several inquiries made, to refer me to any similar case in a big assize centre outside London, such as Liverpool, Leeds or Birmingham, where a lesser fee than five guineas has been allowed.

The present petition having been heard in Brighton, it is plain that normally the calls upon a member of the Bar who undertakes to conduct there such a petition are both greater as regards expense and time than if he had been called upon to conduct such a petition in London. Not only is it obvious that in those circumstances an appropriate amount ought to be added to his fee in respect of these calls, but my inquiries have shown that it is, in fact, a general and proper practice to make such an addition whenever a petition is heard outside London or one of the big centres.

It is clear that if a registrar acts in ignorance of a recognized practice, or if he ignores such a practice, then he acts on a wrong principle. In that respect his discretion as to quantum being clearly a judicial discretion, I respectfully follow what was stated by Croom-Johnson J. when sitting in the Court of Appeal when delivering his judgment in *Dick* v. *Piller*,[1] where he said: "An " exercise of judicial discretion on a wrong principle is appealable.

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[1] [1943] K.B. 497, 507; 59 T.L.R. 276; [1943] 1 All E.R. 627.

1954

SELF *v.* SELF.

Sachs J.

"To exercise it on wrong considerations or on wrong grounds, "or to ignore some of the right considerations, is, in my judgment, "to decide on wrong principles." So, prima facie, the registrar in the present case taxed on a wrong principle.

The only suggestion made by the registrar to support the view that he should allow no more than five guineas was that there were counsel with chambers in Brighton willing to accept briefs on undefended petitions, and that it would be wrong, therefore, to allow a fee on the basis that counsel came, as was the fact, from London. From the material put before me today it appears that there are at most three counsel practising at Brighton. Whether or not these three counsel technically do or do not constitute a local Bar for purposes such as the County Court Rules is, to my mind, irrelevant. Petitions for divorce are not heard in the county court; they are heard in courts which are deemed to constitute a part of the High Court.[2]

Section 6 (4) of the Act of 1949 specifically reserves the right of litigants reasonably to select their own counsel. The words used are, "Where a person is entitled to receive legal aid, the "solicitor to act for him and, if the case requires counsel, his "counsel shall be selected from the appropriate panel, and he "shall be entitled to make the selection himself."

The task of deciding what are the appropriate panels was in practice left to the scheme-making committee (constituted under section 8 (6) of the Act) of practising solicitors, practising barristers and a member of the Lord Chancellor's department. Those panels have been devised upon the footing that outside London there is one panel for matrimonial causes in a given area, and each such area is normally that of a circuit.[3] Accordingly, no registrar has a right, in effect, to dictate to litigants that their choice of counsel in a High Court matter shall be restricted to three or any other such relatively small number. Such a restriction would, as Mr. Simon has pointed out, strike in one respect at the basis of the Legal Aid Scheme, which is intended to put the assisted litigant upon the same footing—including choice of counsel—as an unassisted litigant who has reasonable means with which to pursue his remedies or his defences. In these circumstances, it is clear that the Brighton registrar has gone wrong in principle.

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[2] Supreme Court of Judicature (Consolidation) Act, 1925, s. 70 ("Commissions of assize and jurisdiction of commissioners").

[3] Legal Aid Scheme, 1950, para. 22 ("Barristers' Panels").

There is an alternative way of putting the matter and one on which I would have been prepared to decide it. The result of the taxation of the registrar has been to fix the fee of an appropriately selected counsel at a figure which does not, having regard to the matters to which I have already referred, represent a fair and reasonable remuneration for work done in the normal course of practice. It is not a proper exercise of judicial discretion so to assess their fees as to deprive those who do such work under the Act of 1949 of the 85 per cent. of that fair and reasonable remuneration which the Act provided under the Third Schedule. In this behalf it is not irrelevant to note that counsel, by putting their name on a panel, are in fact obliged to take such work as may be offered to them in the localities which the panel serves.

Being satisfied, therefore, that the registrar has gone wrong in principle, I propose to review the item in question, and I allow it at the figure which, upon inquiry, appears to be the normal and reasonable fee—that is to say, seven guineas. I am glad to know that in allowing that sum I am merely in effect reinstating seven guineas as the brief fee allowed for undefended petitions heard at Brighton—as that was the fee normally allowed by the present registrar's predecessor.

No application has been made for costs in the present summons, and I take this opportunity of thanking all those concerned for having undertaken a matter of importance to the legal aid system on a footing upon which they obtain no remuneration for so doing.

There does not at present appear to exist a method by which appeals of this importance can readily be brought before the court in circumstances which enable those presenting them to be paid out of the Legal Aid Fund. That fact, and the absence of a system under which the Legal Aid Fund itself can be satisfactorily represented are matters which may be worthy of attention.

Order of registrar varied.

Solicitors: *Hancock & Scott for Bunker & Co., Hove.*

J. B. G.

C. A.

1954
June 22, 23, 24;
July 12, 13.

Evershed M.R., Jenkins and Hodson L.JJ.

W. *v.* W. (No. 2).

Husband and Wife — Divorce — Desertion — Termination — Husband deserted in 1946*—Decree nisi of nullity granted to husband—Decree revoked on appeal — Whether desertion terminated by decree — Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*b*).

A wife turned her husband out of the matrimonial home in 1946. She refused to join him in married quarters in 1947 and thereafter until 1952 only communicated with him once directly. On October 12, 1950, the husband presented a petition to have the marriage annulled on the ground of the wife's incapacity, and she in her answer asked for a divorce on the ground of desertion. On November 8, 1951, the husband was granted a decree nisi of nullity. On March 12, 1952, the Court of Appeal, in proceedings ([1952] P. 152; [1952] 1 T.L.R. 879; [1952] 1 All E.R. 858) revoked the decree on the ground that the adoption of a child by the husband and wife in 1945 was such an affirmation of the validity of the marriage as to make it inequitable that the husband should be granted a decree of nullity. On April 16, 1952, the husband took the first step towards amending his petition to claim a divorce on the ground of desertion. On April 25 the wife's solicitors wrote to the husband stating that she wished him to return to her. They wrote again in May and June to the same effect, and the wife herself wrote to the husband on October 15 and 18 asking for a reconciliation. The husband, through his solicitors, refused the wife's offer of a reconciliation on the ground that it was not a genuine offer. The first proceedings having been dismissed on October 15, 1952, by consent, the husband presented the present petition for the dissolution of his marriage on the ground of desertion and was granted a decree. On appeal by the wife:—

Held (1) that on the facts the wife had deserted the husband in 1946.

(2) That once a spouse has deserted, prima facie, if he or she remains away from the other in fact, he or she continues in desertion. Merely writing a letter expressing an intention to come back or to invite the other to come back without more is not enough to terminate the desertion; that the letters written in 1952 by the wife's solicitors and by the wife to the husband were not such as to put an end to the desertion; they did not represent any change of heart on the wife's part or prove a genuine repentance and a sincere and reasonable attempt to get the husband back.

Pratt v. *Pratt* [1939] A.C. 417; 55 T.L.R. 910; [1939] 3 All E.R. 437 and *Cohen* v. *Cohen* [1940] A.C. 631; 56 T.L.R. 597; [1940] 2 All E.R. 331 applied.

(3) That the making of the decree nisi of nullity in November, 1951, did not as a matter of law necessarily put an end to the desertion. Apart from the case where there has been a final order of judicial separation, prima facie it is a question of fact whether desertion without cause has or has not continued during the

requisite period. In the present case, the making of the decree nisi of nullity did not terminate the marriage; the wife's animus deserendi was wholly unaffected both by the presentation of the husband's petition and the obtaining by the husband of the decree nisi and, therefore, her desertion continued.

Harriman v. *Harriman* [1909] P. 123; 25 T.L.R. 291; *Kay* v. *Kay* [1904] P. 382; 20 T.L.R. 521; *Cohen* v. *Cohen* [1940] A.C. 631 applied.

Fender v. *St. John-Mildmay* [1938] A.C. 1; 53 T.L.R. 885; [1937] 3 All E.R. 402 distinguished.

Per Hodson L.J. The obligation being on the husband to maintain the wife, prima facie he is entitled to say where the matrimonial home shall be. The primary obligation of the husband is to maintain the wife in a home where they can be together. It is not an obligation to make a separate maintenance allowance to a woman who is living in another place.

Decision of Mr. Commissioner Bush James Q.C. affirmed.

APPEAL from Mr. Commissioner Bush James Q.C.

The respondent wife appealed against a decree nisi of divorce granted to her husband on the ground of her desertion. The facts appear from the headnote and are fully stated in the judgment of Evershed M.R.

Basil Nield Q.C. and *D. A. Fairweather* for the appellant wife. The wife appeals on three grounds. First, she was not in desertion during the statutory period of three years immediately preceding the presentation of the petition because the husband terminated the desertion in 1950. Secondly, the evidence does not warrant a finding that she ever deserted him. Thirdly, it is submitted that the commissioner went wrong on the evidence in finding that the wife's repeated offers of reconciliation were not genuine.

If the wife deserted the husband (which is denied) the desertion was terminated when in 1950 the husband filed a petition asking for a decree of nullity on the ground of wilful refusal by the wife to consummate the marriage, and prosecuted that petition to judgment, obtaining a decree nisi in November, 1951. The subsequent reversal of that decision by the Court of Appeal (see *W.* v. *W.* (*No.* 1[1]) is not material from the standpoint of the effect which the proceedings had had on desertion by the wife, for the rights of the parties as married persons had ceased to exist on the granting of the decree nisi and, therefore, there was a break in the statutory period of three years, irrespective of what happened afterwards.

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[1] [1952] P. 152; [1952] 1 T.L.R. 879; [1952] 1 All E.R. 858.

C. A.
1954
W. v. W. (No. 2).
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Where one spouse, for example, a wife, is in desertion, *Pratt* v. *Pratt* [2] shows that the husband must prove that he is able and willing throughout the period of desertion to receive the wife back. Lord Macmillan said that the intention of both parties had to be considered. Nullity proceedings followed by a decree nisi constitute a bar making reconciliation impossible and, therefore, they break the desertion.

[Hodson L.J. It is not part of the law that the deserted spouse must be willing to receive back the deserter. Even if the deserted spouse is living in adultery it may be possible for him or her to establish desertion by the other.]

Lord Macmillan gave his opinion of the English aspect of the matter.[3] *Pratt* v. *Pratt* [4] emphasizes the importance of the attitude of mind of the deserting spouse. The circumstances in which one spouse deserts the other may show that, in truth, there was an agreement to separate. If one party has put it out of his power to restore the married position that may well amount to an agreement on his part that the other should remain away. Remaining away in such circumstances would not be desertion "without cause."

The filing of a petition on the ground of nullity is an allegation that there never has been a marriage. After such an allegation has been made by the husband, the wife's desertion cannot be said to have been without the acquiescence of the husband, for he has said that there is no marriage, and never has been one. In *Stevenson* v. *Stevenson* [5] Cozens-Hardy M.R. attempted to lay down the general principle that the presentation of a petition was a bar, but that decision was overruled in *Cohen* v. *Cohen*,[6] where Lord Romer said that each case must be considered on its merits. On the facts in *Cohen* v. *Cohen* [6] the presentation of the petition for divorce was found not to have deterred the respondent from seeking reconciliation and it was not, therefore, a bar in that case. The present case is, however, distinguishable on the facts. Here the ground for the petition is nullity, whereas in *Cohen* v. *Cohen* [6] the wife prayed for the dissolution of an admittedly valid marriage. Also in this case the husband has brought against the wife the serious charge of wilful refusal to consummate the marriage—a charge which was found to be quite unjustified. This charge was a sufficient and justifiable reason for continuing to remain away from the husband and to refrain from making any further attempts at reconciliation: see *Kay* v. *Kay*.[7] The charge in *Cohen* v. *Cohen*[8] was not of that nature.

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[2] [1939] A.C. 417; 55 T.L.R. 910; [1939] 3 All E.R. 437.

[3] [1939] A.C. 417, 424.

[4] [1939] A.C. 417.

[5] [1911] P. 191; 27 T.L.R. 547.

[6] [1940] A.C. 631; 56 T.L.R. 597; [1940] 2 All E.R. 331.

[EVERSHED M.R. *Cohen* v. *Cohen*[8] deals with the effect of filing a petition. Do you draw a distinction between the effect of filing a petition and the making of the decree for this purpose?]

The wife is excused from making further efforts at reconciliation as soon as the petition for nullity is on the file, and she is also deterred by the making of the order. The distinction is not only between the filing of a petition and the making of an order on it but between a petition for the dissolution of marriage and a petition on the ground of nullity. In *Cohen* v. *Cohen*[8] Lord Romer was considering only the effect of a petition for dissolution, but, even on that footing, he only said that the mere fact of filing a petition did not necessarily cause a break in desertion. The test is how the deserting spouse reacts.

[EVERSHED M.R. referred to *Harriman* v. *Harriman*.[9]]

The course taken by the wife shows that she was in fact deterred from seeking reconciliation during the pending proceedings for nullity and after the decree was obtained. The effect of a decree nisi on the obligations of the spouses was considered, admittedly in connexion with the entirely different question of breach of promise of marriage, in *Fender* v. *St. John-Mildmay*.[10] A distinction was there drawn between the effect of the presentation of the petition for the dissolution of marriage on the one hand and the obtaining of the decree on the other. In view of that distinction it is submitted that the observations of Lord Romer in *Cohen* v. *Cohen*,[11] which were directed to the effect of the presentation of the petition, do not apply where, as here, the decree nisi has been obtained. The majority of the House of Lords said that a decree nisi has a special effect on the marriage and is by it to all intents and purposes ended. See particularly Lord Wright's speech emphasizing the distinction between the mere presentation of the petition and the obtaining of the decree.[12]

There is a vital distinction between the filing of a petition for nullity and a petition for dissolution. No desertion is possible if the state of marriage has never existed Where a decree nisi is made on the ground of nullity, the wife is completely absolved from making any attempt at reconciliation. [Reference was also made to *Wilson* v. *Carnley*.[13]]

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[7] [1904] P. 382; 20 T.L.R. 521.

[8] [1940] A.C. 631.

[9] [1909] P. 123; 25 T.L.R. 291.

[10] [1938] A.C. 1; 53 T.L.R. 885; [1937] 3 All E.R. 402.

[11] [1940] A.C. 631.

[12] [1938] A.C. 1, 51.

With regard to the question whether the wife in fact deserted the husband, the evidence shows that she never did so. As to the wife's third contention, that the commissioner was wrong in holding that the letters of herself and her solicitors were not bona fide offers by her to return to the husband, his finding is not conclusive on this matter. There was no evidence to justify his conclusion that her offers were not genuine and sincere. The husband should not have refused these offers out of hand. He should at least have discussed the matter with the wife. [Reference was made to *Price* v. *Price*.[14]]

D. A. Fairweather following. The question is what evidence is admissible to prove that the letters from the wife did not constitute genuine offers to return. Here there is no allegation that the wife had been guilty of any matrimonial offence. *Thomas* v. *Thomas*[15] was a different case; there the deserting husband had been guilty of the matrimonial offence of cruelty.

J. E. S. Simon Q.C. and *H. G. Garland* for the husband. The wife is charged with deserting her husband without cause. The test to be applied is whether the alleged cause of desertion was effective in keeping the spouses apart; whether it operated causatively on the mind of the party charged with desertion. It is conceded that a decree absolute would keep the parties apart, but the question is whether a decree nisi has that effect and operates as an effective cause on the mind of the wife. Here there is no evidence that the decree nisi had any effect whatever on the mind of the wife. During the three years 1947–50 the only communications from her were certain anonymous letters showing intense hostility, and the course taken by her throughout showed the antithesis of any desire at reconciliation.

The principle that the vital test is the effect on the mind of the allegedly deserting spouse is derived from a long line of cases beginning with *Drew* v. *Drew*,[16] where it was found that the allegedly deserting husband, who was imprisoned, had formed an intention to desert which was independent of the imprisonment, and that the imprisonment had had no causative effect on the state of desertion. In *Herod* v. *Herod*[17] it was said to be a question of fact whether the adultery of the deserted spouse had caused the respondent to live apart. In *Harriman* v. *Harriman*[18] the order of judicial separation was found, on the other hand, to have had a causative effect, and in that case the desertion was not "without cause." Even in a case of insanity, as in *Sotherden* v. *Sotherden*,[19] the effect of insanity on the mind of the deserting spouse had to be considered. In *Cohen* v. *Cohen*[20] the general rule stated in *Stevenson* v. *Stevenson*[21] was overruled, and it was said, referring to *Thomas* v. *Thomas*,[22] that every case must depend on its facts. In the present case the facts do not even remotely suggest that the decree nisi deterred the wife from seeking reconciliation, and, as in *Thomas* v. *Thomas*,[22] the offers made by the wife were not genuine.

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[13] [1908] 1 K.B. 729; 24 T.L.R. 277.

[14] [1951] P. 413; 1 All E.R. 877.

[15] [1924] P. 194; 40 T.L.R. 250.

[16] (1888) 13 P.D. 97.

[17] [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722.

There is no real distinction between the effect of a decree nisi on the ground of nullity and a decree nisi for dissolution: see *E.* v. *E.*[23] Both are preliminary and inchoate and subject to defeasance. Neither terminates the marriage. It cannot be said, for example, that a party to a nullity suit could not commit adultery during the interval between the granting of the decree nisi and the decree absolute, nor is sexual intercourse between the "spouses" during that interval adultery. If the wife, for example, died during the interval the surviving husband would be a widower notwithstanding that a decree nisi had been granted. There is, however, confusion because of the form of the decree: see Goddard L.J. in *In re Eaves*.[24] The form of the decree in a voidable marriage is quite misleading. It is not true that the marriage was "null and void." It was valid, and remained valid, until one of the parties took proceedings to have it set aside and obtained a decree absolute. Then it was set aside for all purposes, except in so far as third party rights were concerned: see, for example, *Dodworth* v. *Dale*.[25]

In the present case the wife affirmed the marriage and appealed against the decree nisi. Once her appeal was allowed, the order appealed against was set aside and went for all purposes; she cannot rely on it now as excusing her desertion.

Casey v. *Casey*[26] shows that the marriage rights after a decree nisi has been granted do not differ from the rights after a petition has been presented. See also *Shipman* v. *Shipman*.[27] The wife's defence is founded on a technicality, and the tendency now is to discourage technical defences in matrimonial cases, and not to hold, for example, that such and such an event by operation of law has terminated desertion. Thus, in *Williams* v. *Williams* [28] it was said that there was an irrebuttable presumption that an insane person was incapable of forming an intention to desert, but in *Crowther* v. *Crowther* [29] it was said that each case must be looked at on its own facts.

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[18] [1909] P. 123.

[19] [1940] P. 73; 56 T.L.R. 298; [1940] 1 All E.R. 252.

[20] [1940] A.C. 631.

[21] [1911] P. 191.

[22] [1924] P. 194.

[23] [1950] P. 232; 66 T.L.R. (Pt. 1) 751; sub nom. *Elwes* v. *Elwes* [1950] 1 All E.R. 826.

[24] [1940] Ch. 109; 56 T.L.R. 110.

[25] [1936] 2 K.B. 503; 52 T.L.R. 512; [1936] 2 All E.R. 440.

[26] [1949] P. 420; 65 T.L.R. 528; [1949] 2 All E.R. 110.

If, as is submitted, the only question is whether the action by the husband operated causatively on the mind of the wife, *Fender* v. *St. John-Mildmay* [30] is of no assistance. When a decree nisi is made, the court has, of course, found as a fact that the alleged offence was committed, but the mere finding is unlikely to operate as a cause either to bring the parties together or to keep them apart. Lord Wright said that [31] "the parties ". . . must live apart while the petition is pending," but that is equally applicable to the position after the presentation of the petition. See also *Manser* v. *Manser* [32] and *Lynch* v. *Lynch*.[33]

The commissioner took a correct view of the effect of the offer contained in the letters from the wife and her solicitors. The facts in *Thomas* v. *Thomas* [34] were stronger than they are here. The wife never gave an assurance that she would amend her conduct towards her husband until she was in the witness-box. For the wife's desertion to be terminated by her letters, they must have been bona fide offers and accompanied by contrition for the past and a proper assurance for her future conduct: see *Hutchinson* v. *Hutchinson*.[35] The evidence taken as a whole is inconsistent with any real desire on the part of the wife to return to the husband. The commissioner reached a right conclusion on this point.

Nield Q.C. in reply. In determining whether one spouse has deserted the other, the consensual aspect, which was raised in *Harriman* v. *Harriman*,[36] must be borne in mind. The obligation to return is co-existent with the obligation to receive back, and the state of mind of both parties is relevant. *Pratt* v. *Pratt* [37] was quoted with approval in *Cohen* v. *Cohen*.[38] Filing a petition is not necessarily a bar to desertion, but *Fender* v. *St. John-Mildmay*[39] shows that there is a sharp distinction between the effect of presenting a petition and obtaining a decree nisi. Where the decree nisi is granted on grounds such as those of the present case, there is a heavy onus on the petitioner to show that the wife was not deterred from returning to him. The cases of *Drew* v. *Drew*,[40] *Herod* v. *Herod*[41] and *Sotherden* v. *Sotherden*[42] are distinguishable, for in none of them did the deserted spouse take a step which made the resumption of cohabitation impossible.

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[27] [1924] 2 Ch. 140; 40 T.L.R. 348.

[28] [1939] P. 365; [1939] 3 All E.R. 825.

[29] [1951] A.C. 723; [1951] 1 T.L.R. 1149; [1951] 1 All E.R. 1131.

[30] [1938] A.C. 1.

[31] Ibid. 51.

[32] [1940] P. 224; 57 T.L.R. 45; [1940] 4 All E.R. 238.

[33] [1939] P. 355; 55 T.L.R. 682; [1939] 2 All E.R. 593.

[34] [1924] P. 194.

[35] [1951] P. 272.

[36] [1909] P. 123.

[37] [1939] A.C. 417.

It is incorrect to say that on the allowing of the appeal the decree nisi was expunged retrospectively and cannot now be relied on. If at any time it caused a break in the desertion by deterring the wife from returning, that break is unaffected by what happens afterwards. [Reference was made to *Green* v. *Green*.[43]]

EVERSHED M.R. In this appeal the parties come for the third time before this court in the course of litigation which has sought to determine on one ground or another the marriage between them. It is therefore plainly a case of a most unusual character, a case which I should imagine, and I hope, will not often find a parallel in other instances. It may, perhaps, because of its unusual character, be thought to reflect some imperfection in the administration of this part of the law and, if so, it is an instance of the fallibility of all human institutions. I think it reflects also another human fact, and that is that when a marriage, started, as this was, between two persons of good character, who, as I indicated on an earlier occasion, had both done their best to make a success of it, has once broken down, it may produce feelings of implacable hostility, which tend to prolong and render the more bitter the litigation as it proceeds.

These introductory remarks are not entirely irrelevant, because, on both substantial points with which we have to deal, there is no doubt (and I have the highest authority for so stating) that the case must depend upon its own special and peculiar facts. I shall not recite at length the history of this unhappy marriage. It will be found set out in the Law Reports,[1] which contain the report of the first occasion when the affairs of this marriage were before this court. As there appears, the marriage was made in the year 1941. It is now established (though it was at one time denied by the wife, she admitted it in the course of the present proceedings) that the marriage was never consummated, because, unfortunately, she was physically or nervously, or both, incapable of consummating it. In those circumstances, a young child was adopted by husband and wife in the year 1944. That child died, and its death may well have had a disastrous effect upon the nervous equipment of the wife. However, in 1945 a second child was adopted, which is alive; but the marriage was not a happy one, and in the autumn of 1946, following a quarrel, the wife told her husband to get out and stay out and, after a period during which the only communications between husband and wife appear to have been inquiries by the wife of the husband when he was in fact going, the husband left, and from that time on they never resumed their life together.

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[38] [1940] A.C. 631.

[39] [1938] A.C. 1.

[40] 13 P.D. 97.

[41] [1939] P. 11.

[42] [1940] P. 73.

[43] [1946] P. 112; 62 T.L.R. 180; [1946] 1 All E.R. 308.

[1] [1952] P. 152; [1952] 1 T.L.R. 879; [1952] 1 All E.R. 858.

One other fact of importance must be stated of this early history, namely, that in 1944, following (I gather) the death of her mother, the wife came into money. She then bought a house in Cornwall which for a time was the matrimonial home, named by her, perhaps optimistically, with the Latin word for "Peace." From 1946 the husband was engaged for a time in the Royal Navy, which service took him to Northern Ireland, and to the West Indies. In the period from his departure in the autumn of 1946 until the autumn of 1950, when the first petition was presented, there was some correspondence between the parties. In 1947 the wife communicated with the husband, suggesting that he should come to her at "Pax" when on leave, or even obtain a transfer to a post nearer to that house, but she steadfastly refused in any circumstances to join her husband in married quarters. After that correspondence, the wife virtually ceased to communicate with her husband. She declined to answer letters, save on one occasion when she was sent a present, and when she answered with a brusque terseness which was little or no improvement on complete silence. But she did during that time go so far as to write disgraceful letters in a false name, a performance of which she now says, and I dare say says truly, that she is bitterly ashamed.

The first petition, presented by the husband on October 12, 1950, sought a decree of nullity, based, first, on incapacity and, second, on an allegation of wilful refusal by the wife to consummate the marriage. To that petition the wife put in an answer, denying incapacity and denying wilful refusal. Indeed, at the trial of the matter, she swore, but was disbelieved, that the marriage had been consummated. She also in her answer included a cross-prayer for dissolution of marriage on the ground of the husband's desertion. That petition came for trial before Mr. Commissioner Grazebrook, and, having heard all the evidence and having expressed a preference for the husband's evidence over that of the wife, he made a decree nisi for nullity on the ground of proved incapacity. From that decree the wife appealed to this court, and the appeal was heard on March 11 and 12, 1952. This court, which was composed of the two Lords Justices who are now sitting with me, and myself, in no way differed from the conclusions of fact at which Mr. Commissioner Grazebrook had arrived; that is to say, we did not accept the first argument put before us on the wife's behalf that there was no incapacity and that the marriage had been in fact consummated; but the court came to the conclusion that the circumstances of the adoption of the two boys, those adoptions having been done formally and in accordance with the Adoption Act, 1926, were such as, within the well-known principle expressed in the speech of Lord Selborne L.C. in *G.* v. *M.*,[2] to make it wrong and inequitable for the husband to come then to the court and say that the marriage should be declared non-existent; in other words, that those circumstances amounted to an approbation on the husband's part of the marriage, from which it would not be right to allow him to resile. The result, therefore, was to set aside the decree nisi which the commissioner had pronounced. The answer of the wife had contained a cross-prayer for dissolution on the ground of desertion. It was obvious, therefore, that the order that this court made on March 12 was not an end of the matter, even on the proceedings as they then stood. I quote the final paragraph of my own judgment[3]: "In "all the circumstances and upon the facts of this case (and I need "hardly say that every case of this kind, as every other case, must "depend on its own special and particular facts), I think the "formula in Lord Selborne L.C.'s speech in *G.* v. *M.*[4] has been "satisfied and that the conduct of the husband, taken over the "whole period, was consistent and consistent only with such "affirmation of the marriage as now to make it inequitable (that "is, unjust as between the two parties to the suit) and also contrary to public policy for this court to grant his prayer. The

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[2] (1885) 10 App.Cas. 171, 186; sub nom. *Gordon* v. *Merricks*, 1 T.L.R. 326.

[3] [1952] P. 152, 163; [1952] 1 T.L.R. 879, 886; [1952] 1 All E.R. 858, 863.

[4] 10 App.Cas. 171, 186.

"consequence will be that the judgment ought to be reversed "and we must send the matter back to the court below in order "that the question of dissolution of the marriage on the ground "of desertion may be pursued, if the wife desires to pursue it; "and it may be necessary for leave to be given for the husband "to amend his proceedings. Those are matters which the judge "will deal with. We cannot at present go into them."

The reference to amendment, which I there made, was an intimation, and clearly understood as such, that the husband might wish to apply (and that it might be thought proper to allow his application) to amend his proceedings so as to ask for dissolution on his part on the ground of desertion by his wife. If such an amendment were allowed, the result would be, of course, that the terminus ad quem for the purposes of the desertion would be the date of the petition, namely, October 12, 1950. On April 16, 1952 (shortly, that is, after the judgment to which I have just referred), the husband swore an affidavit intended to be relied upon by him in support of an application to amend his first petition, a course to which it must, I think, be conceded that he had been somewhat encouraged by the observations of this court. A copy of that affidavit was sent to the wife, and there followed, beginning on April 25, a series of letters which are specifically relied upon in the present case as constituting such an offer on the wife's part to put an end to the desertion (assuming that she is to be taken as having deserted) as put an end in law or in fact to that desertion.

In May, 1952, the husband took out a summons for leave to amend. The registrar, as I understand it, disallowed the application on the ground, which the wife put forward, that, if the husband were allowed to amend, it would disable the wife from relying upon anything after October 12, 1950, as terminating the desertion. The husband appealed to the judge, and the judge allowed his appeal. The wife thereupon appealed to this court. So arose the second excursion of these two unhappy people to the Court of Appeal. It was the case of the wife against the husband's application for amendment that, as I have already indicated, its effect would be to disable her from relying upon anything after October 12, 1950, for terminating the alleged desertion, if desertion were proved against her. That point clearly impressed itself forcibly upon the mind of that division of this court which heard the appeal, and it seems clear that the court, over which Singleton L.J. presided, indicated its view that it would or might be unfair to the wife so to disable her. Therefore, appreciating the view taken by the court, the two parties, by their counsel, agreed to an order being made, the effect of which was that the first matrimonial proceedings should be altogether ended; that is to say, the husband, on his part, would consent to his application to amend not being acceded to, and the wife, on her part, would agree to her cross-prayer for dissolution on the ground of desertion, which was still outstanding, being dismissed. Each of them would then be in a position, if he or she thought fit, to make a fresh start in their litigious journey. At no time during the debate upon this matter of amendment, either before the registrar, the judge of first instance or before the Court of Appeal, was it ever indicated on the part of the wife, so far as I understand, that, if the husband made a fresh start, he would find himself faced with the point that any desertion for which the wife might otherwise be properly chargeable had automatically been determined as a matter of law by the pronouncement of the decree nisi for nullity by Mr. Commissioner Grazebrook, so that until that decree nisi had been set aside by this court, namely, from November 8, 1951, until March 12, 1952, the desertion was interrupted. Had the presence or availability of that point been appreciated by Singleton L.J. and his colleagues in this court, I for my part very much doubt whether the order that they suggested should be made would ever have been made. However, the point not having been raised, the order was made by consent in the form that I have mentioned.

The hearing before Singleton L.J. and the agreement of the parties to submit by consent to the order for putting an end to these first proceedings was made on October 15, 1952, and on the very same day the wife broke a silence, which had then persisted for about five years, by writing a letter to her husband, upon which the wife, in this appeal, strongly relies as constituting in itself such an offer to put an end to the desertion that its neglect by the husband operates to disbar him now from claiming the relief which he seeks. That letter was followed by two other letters, and eventually on October 28, 1952, by a meeting in the street in London, an episode surrounded by somewhat extraordinary circumstances, which is the last of the matters set up by the wife as constituting a termination of her desertion.

The husband, however, proceeded then to present the present petition, asking on this occasion for dissolution of the marriage on the ground of desertion. I do not propose to travel at length through the pleadings in the case, but the desertion was alleged to have started by the incident in Cornwall in 1946 when the husband was evicted by the wife from the house, and to have continued uninterrupted till the date of the petition, namely, January 24, 1953. The answer of the wife denied the desertion and then relied upon certain of the letters, to which I have already made a brief reference, as offers unreasonably rejected by the petitioner and therefore as terminating the desertion. Paragraph 2 of the answer is in these terms: "If, which is denied, she ever was in "a state of desertion, the same was terminated by offers on her "part to become reconciled made by letters" (and then the letters are referred to, beginning with the series in April and the series in October and concluding with the so-called interview or meeting on October 28) "which offers the petitioner rejected." Finally, in paragraph 3 it is said: "From November 8, 1951" (that is the date of the decree nisi by Mr. Commissioner Grazebrook) "to March 21, 1952" (which is the date when the first order of this court was drawn up) "the parties were living apart "by reason of a decree nisi of nullity of marriage pronounced by "this Honourable Court."

The trial of this second petition was held before Mr. Commissioner Bush James, who, at the beginning of his judgment, echoed the language of his colleague in the first case by this phrase: "I prefer, and I say this at once, the evidence of the "husband to that of the wife." In the course of his judgment the commissioner went with great care and no little particularity into the cases which had been cited to him bearing upon the questions, what constitutes desertion and what constitutes termination of desertion. Treating this case as one of fact, he came to the conclusion that the offers to which I have alluded and which were relied on in paragraph 2 of the answer were not genuine and satisfactory offers on the part of the wife, sufficient, therefore, by reason of their rejection to put an end to the desertion. As regards the third paragraph of the answer, after citing further cases, particularly *Cohen* v. *Cohen* [5] in the House of Lords, the commissioner also concluded that, in the circumstances of this case, the making of the decree nisi and its existence from November, 1951, to March 1952, did not, as a matter of law, put an end to the desertion, so as to break inevitably, and, from the husband's point of view, fatally, the period of desertion relied upon. It is from those answers to the problems posed on the part of Mr. Commissioner Bush James that the wife comes again to this court for the third time. In my judgment, the commissioner correctly answered both questions put forward before him, and it is my view that this appeal fails and should be dismissed.

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[5] [1940] A.C. 631; 56 T.L.R. 597; [1940] 2 All E.R. 331.

I will deal with the two points stated in the order in which they are pleaded by the wife; that is to say, I will take first the allegation that the wife, by the correspondence pleaded, made offers of a character which required the husband to pay regard to them, so that his rejection of them was a termination on her part of the desertion. But first I should deal with the question whether there was desertion at all. Upon that, little need be said. It is a question of fact. When this episode occurred in the autumn of 1946, there is no doubt that the wife—she admits to having lost her temper—told her husband to get out and to stay out and, accepting the husband's evidence as the commissioner did, and as he was plainly entitled to do, there is equally no doubt that, during the short period between that episode and his actual departure, the wife's sole inquiries and conversation related to the question when he was going in fact. I think, therefore, with the commissioner, that the wife by that conduct intimated that she had the animus deserendi; that is to say, she intimated plainly that she treated the marriage relationship as terminated. If that were wrong, then in any event, as it seems to me, the wife's persistent refusal during the succeeding year to join her husband in married quarters was equally an intimation that she desired to put an end to married life and treat the marriage as determined. But I think that the commissioner was justified in finding desertion in the autumn of 1946 by what occurred at "Pax," Cornwall, and that the wife's refusal to join her husband in married quarters was an affirmation of her desertion and a further clear expression of her animus deserendi.

Mr. Basil Nield relied, in the course of his address, on the correspondence in 1947 as constituting, not an affirmation of the desertion, but, on the contrary, as constituting an offer to resume married life which put an end to the desertion. One answer fatal to that submission is that they were never pleaded for that purpose. But, lest it should be thought that anything in this disastrous case should turn on a mere matter of pleading, I wish also to say that in my judgment these letters of 1947 cannot be regarded as such an offer. [His Lordship considered the letters in question, and continued:] After the year 1947 (and the evidence upon this seems to be agreed), the only communications made by the wife herself until 1952 consisted first, of a very unkind letter acknowledging a present which the husband had sent her, and secondly, of the correspondence written in the false name and signed absurdly "C. Brooke Elliott, M.A., LL.B.," of which I say no more than that the wife now very properly says she is bitterly ashamed; but on October 12, 1950, it is to be noted that the solicitors acting for her wrote as follows to Lieutenant J. A. W——, R.N., c/o The Admiralty: "We act "for your wife who has instructed us that she desires to enter "into a deed of separation with you. We shall be glad if you "will call to see us in the matter or, alternatively, let us know "the name and address of your solicitors." As a matter of fact, on that same day the first petition was presented asking for a decree of nullity.

I now come to the first series of letters which begin with the letter of April 25, 1952, relied upon in paragraph 2 of the answer. These letters are all written by the wife's solicitors. The first followed very shortly after the making of the affidavit by the husband to support his intended application for leave to amend his first petition. The letter addressed to the husband's solicitors, as far as relevant, is as follows: "We have now been instructed "by our client to inform you that she will not proceed with her "cross-petition, and we have been instructed to withdraw same "accordingly. We have also been instructed to inform you that "if your client is willing to return to our client, she is prepared "to have him back." Then there is a request about maintenance. That, as an offer by a deserting wife, was not promising in terms and it is affected by this inherent and very serious defect, that it amounts to no more than the suggestion that she is willing to receive back an errant husband. The letter was formally acknowledged. There then occurred the issue of the summons. On May 23 the solicitors for the wife, having received no response to their earlier suggestion, wrote again as follows: "We would "remind you that on April 25 we wrote to you a letter, the "material part of which is that our client desired to become "reconciled to her husband." That seems to me to put a somewhat favourable gloss for their own purposes upon their first letter. "We are sorry to see that you have never replied to "this letter save to issue a summons . . . Our client's position is "quite clear. She wants her husband back above all else and "for our part we believe this is a genuine desire. If, however, "your client will not return, then the future must be considered "in the light of that refusal, and our client may decide to "proceed with her prayer for divorce," the prayer for divorce being the prayer in her answer in the first proceedings, still pending. It is plain that that letter does on its face show a rather more enthusiastic approach on the part of the wife, but the effect of it is somewhat marred by the repetition of the word " return " "—if, however, your client will not return "—and I think that the general effect is still that of the earlier letters, that the only suggestion made by the wife, personally or through her solicitors, was that the husband should come back to the Cornish residence.

On June 5 the husband's solicitors sent a reply, stating that they did not accept the offer as a genuine and sincere offer to terminate the desertion and that, therefore, they were unable to accede to the suggestion made. On June 9 the wife's solicitors, in the second paragraph of a letter of that date, said: " After the " proceedings were concluded our client decided that the past " should be forgotten and this was the time to seek a reconcilia- " tion. There was no ulterior motive," etc. That, I think, may be regarded as mere argument. On June 19 they said the same thing again, but again used the word " return." " She would " like," say they, " to be given the opportunity of proving that " she is sincere in asking him to return to her."

It will be convenient if I now read the letters which immediately followed the hearing by the Court of Appeal of the appeal in October, 1952. On the 15th of that month—the same day as the hearing occurred—she wrote: " Dear Jack, Now that all the " litigation has been dismissed I am writing to ask if you will " come and see me so that we can talk about the future and " see if we can make a fresh start again together. I am asking " this for John's sake "—John being the second adopted child— " as well as ours as I think we both owe it to him to try to make " a success of our future life together. Yours, Helen." The letter received no response. But the wife's urgency is shown by the fact that on the 18th she wrote again: " Dear Jack, Won't " you let me have an answer to my letter of the 16th? " It was in fact the 15th. " Would you prefer to fix a meeting place " somewhere in London, rather than coming here to see me? If " you'll let me know what times suit you best, I can fit in with " them. Do let me know as soon as possible "; and again on the 20th: " Won't you at least give me a chance of showing " you that I meant what I said? Do let me meet you some- " where and talk things over." It may be thought surprising that, after so many years of complete silence, the wife should have become by correspondence so relatively loquacious. However, on October 20 the husband's solicitors said that they had received two letters suggesting a meeting, and continued: "We are "instructed by our client that he has no wish to meet your "client, as he feels, looking back over the last seven years, that "the offers by her are not genuine."

The final episode occurred on October 28. On that occasion the wife plainly laid in wait for the husband as he set out early in the morning for work. As Mr. Simon justly said, the meeting was illuminated by one rather extraordinary circumstance. The wife had arranged for a very well-known private detective to be present at a reasonable distance, so that he could see what occurred, and, when the detective was cross-examined upon this matter, he was asked in conclusion this question: "Do you think "perhaps that she intended to stage a scene and to have you "there as a witness?", to which the experienced agent replied, with caution: "I have no knowledge of that." As I think will appear, the commissioner plainly thought that that question was founded on a correct surmise of facts. Those are the relevant facts, and it now remains for me to state the grounds on which I base my conclusions that the commissioner rightly decided this point raised on the second paragraph of the answer.

A number of cases have been cited to us, and I shall, I hope, be forgiven if I do not cite many in the course of my judgment. The relevant authorities were taken into careful consideration by the commissioner, and, in my view, he in no respect misdirected himself. Desertion, as a matrimonial offence leading to a petition for divorce, differs from other matrimonial offences, such as adultery, in that it is not and does not consist of an act or a number of acts separate and distinct in themselves, but is rather an activity or course of conduct which must persist for the statutory period up to the date of presentation of the petition; so that, except in cases where the statute otherwise provides (and this is not such a case) it is not permissible, if the period be broken, to add the broken periods together to make a sum of three years in all. The question, then, is: What is sufficient to break the period, the course of conduct, called desertion? It has been laid down in one of the passages I shall presently quote that once a spouse has deserted (that is to say, once he or she has evinced the intention of treating the marriage relationship as at an end) then, prima facie, if he or she remains away from the other in fact, he or she continues in desertion. Merely writing a letter or expressing an intention to come back, or to invite the other party back, without anything more, is not enough. There must go with the expression, and be illustrated and evinced by it, a real change of heart.

I am at present leaving out of account the subject-matter of the third paragraph of the answer; that is to say, the case in which, as it is said, either the conduct of the deserted party or the circumstances are such that it cannot reasonably be expected or asked of the deserting party that he or she should make any move towards ending the desertion. But, in applying myself to the subject-matter of the second paragraph in the answer, a deserting party may put an end to the desertion provided that he or she does evince a real change of heart. What is said here is that the so-called offers in the correspondence of April and October, 1952, and the incident in the street on October 28, 1952, did evince a real change of heart, and that the husband was not entitled to disregard them and, having chosen to do so, he can no longer rely upon the subsequent absence of his wife as constituting continued desertion.

In the course of his reference to the cases, Mr. Simon contended that in testing whether or not the deserting spouse has terminated his or her desertion, one must apply, or in some cases will have to apply, a subjective test and an objective test: that is to say, to consider whether the refusal of the deserted spouse to respond to the advance was reasonable on his or her part, as well as to consider whether objectively what the deserting spouse (and, indeed, the deserted spouse as well) did constituted a termination of the desertion. In cases in which the offending spouse has been guilty of some matrimonial offence in addition to desertion, for example, cruelty, it is, I think, true that the other, the injured, spouse may reasonably expect a much greater manifestation, a much greater proof, of real change of heart extending both to the other offence and to the desertion than in a case in which the only matter at issue is desertion; and although here, as Mr. Simon observed, the wife's behaviour during the marriage, before as well as after the alleged desertion, was in many respects reprehensible, and the commissioner described it, as to one part of the history, as "outrageous," still this is a case in which no allegation has been made by the husband, save an allegation of desertion.

With that premise, I will now turn to the two cases from which I desire to make citations from the opinions of Lord Romer, for they will sufficiently found the principle which, in my judgment, has to be applied to the facts of the present case. In *Pratt* v. *Pratt* [6]

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[6] [1939] A.C. 417; 55 T.L.R. 910; [1939] 3 All E.R. 437.

C. A.
1954
W. *v.* W. (No. 2).
Evershed M.R.

Lord Romer said [7]: "But can it be said in view of those letters "that the respondent thereafter was continuing to desert her "husband? For the purpose of assisting your Lordships in answering this question Mr. Noel Middleton on behalf of the appellant "called your Lordships' attention to several reported cases in "which the subject of desertion by one of the spouses of the "matrimonial domicil has been considered by the courts. These "were, no doubt, the authorities that had been cited to the "Court of Appeal and were referred to by Scott L.J. in the "passage in his judgment to which I have already referred. I "agree with him in thinking that they do not lay down any "principle of law applicable to the question that we have to "decide. For, as was pointed out by Warrington L.J. in one of "them, approving a statement made in the Divisional Court: "'The question whether desertion continues is one of fact to be "'determined in view of the circumstances of the particular case.' "That was the case of *Thomas* v. *Thomas*,[8] where a husband "shortly after committing the matrimonial offence of desertion "had written to his wife offering to resume cohabitation. The "court, however, came to the conclusion that the husband's offer "was not a genuine one. His desertion was accordingly treated "as continuing notwithstanding the offer. My Lords, in the "present case, I can find nothing that even remotely suggests "that the offer of the respondent contained in the two September "letters was otherwise than genuine. The appellant indeed concedes that the writing of the letters was a spontaneous act on "the part of the respondent and not one done upon the advice "or at the instigation of her legal advisers. Nor does he suggest "that the letters were written for the purpose of being used by "her in any legal proceedings. All that he could say about the "letters when giving his evidence was that he took the view at "the time that the respondent was not 'honest in her desire to "'come back.' By this, I think, he must have meant that she "only desired to come back on conditions to which he could not "be expected to submit. But there is no word in either letter to "justify any such suspicion on his part."

In *Cohen* v. *Cohen*,[9] Lord Romer's speech was the only speech delivered, the other noble Lords concurring in it. He said [10]: "Now in the case of *Bowron* v. *Bowron*,[11] where the "intention of a husband to desert his wife had been established, it

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[7] [1939] A.C. 417, 426, 427.
[8] [1924] P. 194; 40 T.L.R. 250.
[9] [1940] A.C. 631.
[10] Ibid. 638.
[11] [1925] P. 187; 41 T.L.R. 245.

"was said by Scrutton L.J. that the intention is presumed to "continue unless the husband proves genuine repentance and "sincere and reasonable attempts to get his wife back. There "were certainly no such attempts in the present case."

Those two passages will provide for me my text, and I ask myself the question as a question of fact: Were the nature and the true intention of these communications, the first batch of them being written by the solicitors and the second written by the wife herself, such in fact as to put an end to the desertion, having regard to the husband's rejection of them? I answer that negatively. Treating it as a matter of fact, I think that clearly the commissioner had evidence before him which entitled him to conclude that the true character of these letters (and the same is true of the incident in the street on October 28, 1952) was that they were manoeuvres in what I will call, without meaning the phrase offensively, the legal game. I do not think that they did, in fact, represent any change of heart. No doubt they were true and genuine in the limited sense that when she said through her solicitors, for example, in the letter in April, "I will have you "back," she would have opened the door to the husband if he had presented himself at "Pax" in Cornwall; but the word "genuine" in this context has, I think, a wider significance; and I agree with Mr. Simon that, in judging of this matter, it is necessary to bear in mind the background. I will not over-elaborate the matter. It is sufficient, in my judgment, to note that the letters written by the solicitors in April followed immediately after the first petition had been before this court, and this court had indicated to the husband that he might be advised to take steps to amend his petition then existing, so as to ask for dissolution on the ground of desertion. I recall that these letters were the first communications that had been received by the husband from the wife for a long period of time, a very long period of time indeed if one excludes the suggestion in October, 1950, for a deed of separation, the one terse letter acknowledging a present in 1947, and the discreditable communications purporting to come from one C. Brooke Elliott, M.A., LL.B., in 1949.

It is also to be borne in mind that, in considering what was really in the wife's mind, great importance in a case of this sort must obviously be attached to the demeanour of the wife as a witness in the witness-box, a capacity which she did not fill with satisfaction to this commissioner or to the commissioner who tried the first case. I think also that the character of the April communications is reflected by the circumstances and the character of the October communications. Again, after this long interval of time, in which no move had been made by the wife, and on the same afternoon that the matter was before the Court of Appeal, she broke a silence of years by writing a letter personally to her husband, followed by two more within the course of five days. If the nature of those letters is in doubt, they are in turn coloured by the extraordinary circumstance that she made careful provision for the meeting which she had with her husband and the scene which ensued to be observed by an inquiry agent on the other side of the street.

I need not pursue these matters. Going back to the April letters, I only refer again and finally to the circumstance that, as I read them, they reiterate the point the wife made early on, namely, that she was willing to have the husband back in her house, but was not willing to join him elsewhere in any circumstances, a point which she had made abundantly clear at the time when, as I hold, she was indubitably a deserting party. Without, then, pursuing the matter at greater length, in the light of all the facts, I think that this commissioner was amply jusified on the evidence in concluding, as he did, that these communications in April and October, 1952, did not have the quality which, because they were rejected, entitles her to say that her desertion was thereby terminated.

I turn accordingly to the third paragraph of the answer, the point raised by her that, whatever might be said of her own conduct, as a matter of law the making of the decree nisi for nullity in November, 1951, necessarily put an end to the desertion, and that the desertion accordingly ceased to exist during the period that the decree nisi stood; that is, until March, 1952. At first sight, I must confess that the proposition has an obvious attraction. A decree nisi is a decree, conditional it is true, but nevertheless it is a decree, an order of the court, to the effect that the marriage, being voidable on the ground of incapacity, has been successfully avoided by the petitioner. It is, I think, desirable to read the order itself. It is in the normal form for decrees of this kind. After referring to the hearing of the evidence, and so forth, it reads: "The commissioner pro- "nounced on November 8, 1951, . . . that the petitioner had "sufficiently proved the contents of the petition and decreed that "the marriage in fact had and solemnized on the 1st day of "January, 1941, between the husband and the wife be pronounced "and declared to have been and to be absolutely null and void "to all intents and purposes in the law whatsoever by reason "of the incapacity of the respondent to consummate the marriage "and the said petitioner be pronounced to have been and to be "free from all bond of marriage with the respondent unless"— and here comes the condition—"within six weeks from this date "sufficient cause be shown to the court why this decree should "not be made absolute." Now, the attraction of the argument obviously rests upon this, that, if the court has decreed that the petitioner (the husband in this case) be free from all bond of marriage, it would obviously appear to follow that any approach on the part of the wife to resume marital relations would be futile, since they would be addressed to a party who was under no obligation whatever to pay any regard to them. But this was a decree nisi and proceeds with the condition "unless it be "shown that the decree should not be made absolute." In the event, it never was made absolute, and what the wife did upon this decree being made was, not to accept it, but to repudiate it instantly and to appeal against it, an appeal which was in the end successful.

What, then, is the test to be applied? I would be extremely reluctant to hold that the wife is entitled to resist successfully the husband's petition on this ground, having regard to what occurred in the earlier proceedings. I refer particularly to what occurred when the matter came before the Court of Appeal in October, 1952, and, on the suggestion of the court, the parties mutually agreed to put an end to the first proceedings and to start afresh, there never having been any mention or intimation on the wife's part that she intended to rely on, or that there was available to her, this point which, if valid, made the discussion wholly futile. As I have said, had she done so, I think that the Court of Appeal very likely would have made an order somewhat different from the one which was made in October, 1952. However, that of itself would not justify me in rejecting this point if, in other respects, I thought it well-founded.

The answer to this point is to be derived from *Cohen* v. *Cohen*,[12] a case which had a very long history of litigation. Originally the appellant wife had in 1930 and in 1936 presented petitions seeking for the dissolution of her marriage with the husband on the grounds of his adultery. For reasons which are irrelevant, the wife obtained leave on both occasions to withdraw those petitions. On January 1, 1938, the Matrimonial Causes Act, 1937, came into force, and by section 2 of that Act desertion for three years immediately preceding the petition was made a ground for divorce. The wife thereupon presented her third petition on March 2, 1938, seeking dissolution of her marriage on the ground of desertion. By the common sense of the matter, it was perfectly clear that the husband had deserted his wife for a very long period of time, but the point was taken that the presence of the petitions for dissolution on the file, inevitably and as a matter of law, broke the period of desertion alleged. The matter came before Hodson J. sitting at first instance, and he felt bound by an earlier decision of this court in *Stevenson* v. *Stevenson*[13] to hold that the husband's point was well-founded, a conclusion which was affirmed on the same grounds by this court. When, therefore, the matter came to be considered in the House of Lords, the validity of the decision in *Stevenson* v. *Stevenson*, which had then stood for nearly a generation, was reviewed, and the substance of the conclusion was, as I follow the speech of Lord Romer,[14] that there is no rule of law which governs cases of this kind to the effect that the presentation of a petition seeking dissolution of a marriage is so inconsistent with the assertion by the petitioning party that the other is a deserter that automatically and ipso facto the desertion is thereby terminated.

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[12] [1940] A.C. 631.

The question posed was stated by Lord Romer thus[14]: " Where " one of the spouses has committed the matrimonial offence of " desertion, does that desertion necessarily come to an end by the " presentation and service upon the deserting spouse of a petition " by the other one asking for a dissolution of the marriage? " After narrating the facts of the case and after the citation from the judgment of Scrutton L.J. in *Bowron* v. *Bowron*,[15] the noble Lord turned to the decision of this court in *Stevenson* v. *Stevenson*,[16] and pointed out that the grounds upon which it was based, which were the presence of earlier authorities, were in his view not sound. Thus, Lord Romer observed,[17] in reference to the judgment of Cozens-Hardy M.R. in *Stevenson* v. *Stevenson*[18]: " It will be observed that the Master of the Rolls did not base " his decision upon any facts peculiar to the case before him. " He laid down a general principle applicable to all cases where " the deserted spouse places upon the file a petition for judicial " separation or divorce. The subsequent desertion cannot, he " held, be treated as being without cause while the petition

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[13] [1911] P. 191; 27 T.L.R. 547.
[14] [1940] A.C. 631, 635.
[15] [1925] P. 187.
[16] [1911] P. 191.
[17] [1940] A.C. 631, 640.
[18] [1911] P. 191.

"remains on the file. I shall consider the reason that he gave "for coming to this conclusion at a later stage in this judgment. "For the moment I merely propose to call attention to the "singular fact that, of the three cases to which he referred as "justifying his conclusion, the first two in no way establish, and "the third seems to be inconsistent with there being, any such "general principle as he was laying down."

The second of the cases on which Cozens-Hardy M.R. had relied was *Harriman* v. *Harriman*,[19] which was a decision of a full Court of Appeal. Lord Romer, dealing with that case, said [20]: "*Harriman* v. *Harriman* [19] was a decision of the full Court of "Appeal given in these circumstances. A husband deserted his "wife in July, 1905. In March, 1906, the wife obtained an order "under section 5 of the Summary Jurisdiction (Married Women) "Act, 1895, that her husband should pay a weekly sum for her "support; but the order contained a provision under section 5 (*a*) "that the wife should no longer be bound to cohabit with her "husband, and this provision by virtue of the subsection had "the effect of a decree of judicial separation. In December, 1907, "the wife presented a petition for dissolution of the marriage on "the grounds of the husband's adultery and of his desertion for "two years without reasonable excuse. It was held that the "effect of the non-cohabitation clause was to prevent the continuance of the desertion after the date of the order. There "had been a decree or what was equivalent to a decree of the "court in the face of which it was out of the question that the "husband should make any attempt to return to the matrimonial "domicil. The case is no authority whatsoever for the proposition "that the mere filing and service of a petition for divorce or "judicial separation has of itself the same effect."

Later, in connexion with the same matter, the noble Lord pointed out that one of the sections of the Matrimonial Causes Act, 1937, had been passed directly in order to deal with the difficulty which *Harriman* v. *Harriman* [21] had created and which he (Lord Romer) said,[22] was unquestionably rightly decided. Then Lord Romer observed, taking the example of *Kay* v. *Kay*,[23] that there may be cases where the petition contains gross charges against the husband, so reckless and so unfounded, that he cannot reasonably be expected to make any attempt to bring his desertion to an end. Then, having dealt with those matters, Lord Romer concluded thus [24]: "My Lords, in my opinion, the decision in "*Stevenson* v. *Stevenson* [18] in laying down a general principle "applicable to all cases in which a deserted spouse presents a "petition for divorce or judicial separation was wrong and should "be overruled. The question whether a deserting spouse has "reasonable cause for not trying to bring the desertion to an end "and the corresponding question whether desertion without cause "has existed for the necessary period must always be questions "of fact, and the determination must depend upon the circumstances of the particular case. I deprecate attempts to lay "down any general principle applicable to them all." He then considered the facts of the case and continued: "It was "never disproved, and there is nothing in the history of this "case that even remotely suggests that the petition while it "was on the file deterred the respondent in the very least from "taking steps to end his desertion." Then, finally: "It is "abundantly plain that there was nothing connected with this "second petition"—that is, the second petition for divorce on the ground of adultery—"that could in any way have induced "the respondent to refrain from putting an end to his desertion "had he the slightest desire to do so."

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[19] [1909] P. 123; 25 T.L.R. 291.
[20] [1940] A.C. 631, 642.
[21] [1909] P. 123.
[22] [1940] A.C. 631, 644, 645.
[23] [1904] P. 382; 20 T.L.R. 521.

I fully appreciate that there may well be great differences both in the facts themselves and in the effect they are likely to have upon other people's minds between the mere presentation of a petition (not later proceeded with) on the one hand, and the obtaining of a decree nisi on the other. A deserting spouse might be able to establish as a matter of fact and without great difficulty that the making of a decree nisi for dissolution or for nullity so affected his or her mind and conduct that a court would hold that the desertion had then ceased. It may well also be true that *Cohen* v. *Cohen* [25] is only direct authority for the view that the presentation of a petition for divorce or for nullity on the grounds that the marriage is voidable, such as this, would not in itself as a matter of law break the period of desertion. But I take the case also to be authority, from the passages that I read, that, prima facie at least, it is a question of fact in each case whether the desertion without cause has or has not continued during the requisite period. Where there has been a final order made for judicial separation or an order having the same effect, then no doubt a state of affairs arises—is established by the court's order—which is inconsistent with the subsistence of

[24] [1940] A.C. 631, 645, 646.

[25] [1940] A.C. 631.

desertion by either spouse, so this court decided in *Harriman* v. *Harriman*[26] and, as the House of Lords held, rightly decided. But that is not this case.

The making of the decree nisi in the present case did not terminate the marriage. The pendency of a decree nisi is not itself inconsistent with the commission of a matrimonial offence, including, as I conceive, desertion. The court then has in this case, as in all others of the same kind, to ask itself the question: Did the obtaining by the husband of the decree nisi for nullity on November 8, 1951, in fact end the desertion? The court still has to decide whether, to use the exact language of Lord Romer, the desertion without cause existed during the whole period.

I have pointed out that the form of the order showed on its face that it was not final, but conditional. I have also sketched the long and lamentable history of the attempts of these two unfortunate people to live happily the lives of a man and wife. One thing, at any rate, in my judgment, is clear, and that is that in fact this decree did not affect the mind of the wife, treating her as being in desertion, in the slightest degree. During the period from the presentation of the petition onwards, she in no way altered her attitude of mind. In her answer she included a prayer for dissolution of the marriage on the ground of desertion, and the presentation of the petition was in fact exactly contemporaneous with a suggestion from her solicitors that the two of them should enter into a deed of separation.

Applying, therefore, the test of fact which Lord Romer laid down to the present case, and considering all the circumstances of the case, I am satisfied that the commissioner rightly held that the wife's animus deserendi, her desertion, her state of mind and conduct, were wholly unaffected both by the presentation of the petition and the obtaining by the husband of the decree nisi. It will be remembered that, according to the language of paragraph 3 of the wife's answer to the present petition, "The parties "were living apart by reason of the decree nisi." If one thing in this case is clear, it is that "the parties" were not living apart for any such reason. In my judgment, the commissioner was well entitled to hold that they were living apart by reason of the fact that the wife had deserted the husband and continued at all material times to desert him. I prefer to leave it like that, without more, save for the reference to one other case.

I do not refer to the cases by which Mr. Simon illustrated his argument that mere impossibility of cohabitation, if such there be, is not necessarily and of itself an end to the desertion period. In the course of his argument he cited instances where one or other party is incarcerated in prison or where one or other party is detained owing to mental incapacity. Those cases may be useful to show that there is no rule in dealing with matters of this kind, and to emphasize the necessity for having regard to the state of mind of the deserting party; though I do not forget that the state of mind of the deserted party is or may also be relevant.

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[26] [1909] P. 123.

Another argument was suggested by Mr. Nield for rejecting the view which I have formed, an argument based on *Fender* v. *St. John-Mildmay*,[27] the subject-matter of which was wholly different from that with which we are concerned. The point of the citation was, however, to show that there is so great and so valid a distinction between the presentation of a petition for dissolution of marriage, on the one hand, and the obtaining of a decree upon that petition, on the other, that the observations of Lord Romer in *Cohen* v. *Cohen* [28] should be treated as inapplicable in a case where a decree nisi has been obtained. I am unable to agree. In *Fender* v. *St. John-Mildmay* [29] the respondent, St. John-Mildmay, had, after a decree nisi for divorce had been obtained against him by his wife, made a promise to the appellant, Miss Fender, to marry her when the decree had become absolute. After the decree had become absolute and St. John-Mildmay was therefore in a position to perform his promise, he decided not to marry the appellant after all, and she sued him for breach of promise of marriage. The point, and the only point, as I understand it, which was decided by the House of Lords, was whether the appellant, Miss Fender, was disabled from suing and recovering damages on the ground that the promise made, and proved by her to have been made, by St. John-Mildmay was made in circumstances which rendered it contrary to public policy that it should be recognized and enforced by the courts.

It was said, and said truly, that during the period between the making of the decree nisi and the making of the decree absolute the marriage had subsisted; so that (as I mentioned earlier in a different connexion) if, for example, one party to the marriage during that period had sexual relations with someone else, that would constitute the matrimonial offence of adultery; and therefore that, since the marriage was subsisting, it was contrary to public policy, because it would tend to the depravity of public morals, that the court should recognize and enforce a promise made by a married man, albeit after decree nisi had been obtained, to marry somebody else. It was suggested that it might tend to encourage one party to murder the other party to the marriage; that it would encourage the committing of promiscuous adultery and so forth. Much of the lively opinion of Lord Atkin was directed to ridiculing suggestions of that kind. It is no doubt true that in certain of the speeches, particularly the speech of Lord Wright, emphasis was laid upon the circumstance that the making of a decree nisi marked a definite stage in the termination of the first marriage relationship. Lord Atkin himself at times used similar language. Lord Thankerton said [30]: "My Lords, "once the decree nisi has been pronounced the petitioner, as I "have already stated, has done all that he or she can do in "order to obtain dissolution of the marriage tie, except to apply, "after expiry of the statutory period, for the decree absolute." On the other hand, there are other passages in Lord Atkin's speech which seem to me to be no less applicable to the state of affairs which exists even before the presentation of the petition and long before any decree has been pronounced. I take one example [31]: "If a respectable man whose wife has fled with the lodger "leaving the children in his charge engages himself to another "respectable person to marry her as soon as he is free no public "interests suffer. In my opinion they benefit. Similarly, in the "converse case of a wife whose husband is living with another "woman of whose child he is the father. Do either of these "persons still owe any kind of duty to love or cherish the other "spouse, to whom no doubt they are still married, or owe them "any duty which in the interests of themselves or the public will "be impaired by a promise to marry a third person when free?"

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[27] [1938] A.C. 1.
[28] [1940] A.C. 631.
[29] [1938] A.C. 1.

In any case, the decision in *Fender* v. *St. John-Mildmay* [32] seems to me to be directed to a wholly different question from that with which we are concerned. The question was whether it was contrary to good morals and contrary to public policy that the court should recognize and enforce a conditional contract of a particular kind, namely, a contract by A. to marry B. upon A.'s marriage ceasing, that promise having been made at a time when, according to the common sense of the matter, it was as near certain as anything could be that A.'s marriage would shortly be terminated by order of the court. We are not here concerned with any question, so far as I can see, of public policy. If there was any distinction, vital to the decision, between the presentation of the petition and the making of the decree nisi in *Fender* v. *St. John-Mildmay*,[32] its relevance was related to the question of public policy and does not seem to me to be essential to a consideration of the point raised in this case.

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[30] [1938] A.C. 1, 25.

[31] Ibid. 17.

[32] [1938] A.C. 1.

Finally it was suggested by Mr. Basil Nield—and I will assume that this point, for the purposes of my judgment, is open to him on the pleadings—that the inclusion in the first petition of the allegation not merely of incapacity, for which the unhappy wife could not be blameworthy, but also the allegation of wilful refusal on her part to consummate the marriage, constituted charges of so extravagant a character—that is, within the line of cases of which Lord Romer had treated *Kay* v. *Kay*[33] as an example—that after they had been made, in the language of Scrutton L.J., the wife could not reasonably be expected to make any approach whatever to her husband. It is true that to this extent the charges may be regarded as grave and unfair, since it was proved that she underwent operations in the hope that she would thereby be assisted in having sexual relations with her husband; but, having regard to the whole conduct and tenor of the case, I am far from saying that the charges were reckless and so unfounded and extravagant as to render it no longer incumbent upon the wife to take any step to end her desertion. In any event, I add that it is clear, on the facts, that the inclusion of those charges in the petition did not influence in the smallest degree, in my judgment, the conduct of the wife from the time the petition was presented onwards.

For these reasons I agree with the commissioner in thinking that the making of the decree nisi and its subsistence until March, 1952, cannot be treated as putting an end to the desertion, and I therefore reject the argument contained in paragraph 3 of the wife's answer, as I have already rejected the arguments contained in paragraphs 1 and 2. In my judgment this appeal should be dismissed.

JENKINS L.J. I agree and have nothing to add.

HODSON L.J. The husband set out in his petition to prove desertion from 1946 until the presentation of the petition, which was in January, 1953, and the first question which has to be answered is whether the wife ever did desert the husband. That

[32] [1938] A.C. 1.

[33] [1904] P. 382.

question was answered in his favour by the commissioner, but his decision has been attacked in this court on the ground that the evidence shows that, although there were quarrels between these parties in the year 1946, when they were living in a house which belonged to the wife, and the wife turned the husband out, this turning out was merely something which happened in anger and was not intended by the wife to bring about a permanent separation. The commissioner, having heard the evidence of the parties and of the unhappy scenes which had occurred before the wife told the husband to go and before he went, came to the conclusion that desertion did begin in the way in which the husband said, and, in my judgment, that decision of his cannot properly be reversed in this court.

The matter does not rest there, because although the initial turning out by the wife was wrongful, yet the parties continued to communicate with one another, and the husband has to prove that the desertion continued. It was his duty in so doing to put before the court all the relevant material, including letters which had passed between him and his wife, and this he did. Those letters of the husband, while complaining bitterly of his wife's bad temper and the unhappy life which he had led with her in this house, contained a clear offer to have her to live with him in married quarters, he having joined the Royal Navy after leaving home in December, 1946. That offer was rejected by the wife.

The argument directed to this court is that the wife had been perfectly willing to have her husband back, and in August, 1947, had proffered what she called an olive branch, by a letter in which she suggested to the husband that he should come down to the old home in which they had lived together; if he could not live there altogether, he could spend his leaves there while he was home from his station. It is said that the husband was, on the face of it, unreasonable in not falling in with that suggestion. That contention was, I think, rightly rejected by the commissioner. The obligation being on the husband to maintain his wife, prima facie at any rate, the husband is entitled to say where the home shall be. That, of course, is not a proposition of law, because there may often be circumstances where the husband is unreasonable in suggestions which he may make as to the home which he is ready to offer to his wife, or where the circumstances of his own life make it impossible for him to make a home for her with him, whether the circumstances of his life are of his own choice or of necessity. It is usually the necessity of his calling. But in the background of these cases, I think it always has to be remembered that the primary obligation of the husband is to maintain the wife in a home where they can be together; not an obligation to make a separate maintenance allowance to a woman who is living in another place. Whether the desertion continued from that time in 1947 until the presentation of this petition depends on a consideration of all the facts in the case. As Warrington L.J. said in *Thomas* v. *Thomas*,[34] to which my Lord has referred: "The "question whether desertion continues is one of fact to be determined in view of the circumstances of the particular case." Lord Romer in *Pratt* v. *Pratt* [35] in 1939 quoted that sentence with approval. It cannot, however, be stated as an absolute proposition that the question is one of fact, because, as appears from *Cohen* v. *Cohen*,[36] there is at least one exception to this rule, because if one of the spouses has obtained a decree of judicial separation or a decree of a court of summary jurisdiction which has that effect, it is shown by *Harriman* v. *Harriman* [37] that there is a break in the desertion. As Lord Romer said in *Cohen* v. *Cohen* [38]: "There had been a decree or what was equivalent to a decree "of the court in the face of which it was out of the question that "the husband should make any attempt to return to the matrimonial domicil." Apart from that exception, although it has often been argued in these courts that other matters must be taken to prevent desertion running as a matter of law, I think the attempts have always failed.

One example is the example of a deserted spouse, who takes proceedings against the other in these courts. It was argued that, in so doing, he or she was praying the other spouse to keep away. That problem was considered in *Stevenson* v. *Stevenson*,[39] which was overruled by *Cohen* v. *Cohen*,[40] and the argument which, on the face of it, has force, is stated, citing from Cozens-Hardy M.R. in *Stevenson* v. *Stevenson* [41]: "The presentation of the petition "and its continuance on the files of the court prevented the "subsequent desertion from being without excuse." That contention, that the praying the other side to keep away by petitioning this court must, as a matter of law, operate to prevent desertion running, was rejected by the House of Lords, and that decision stands as good law today.

Similarly, it can, I think, be argued with great force that where a deserted spouse is living in adultery, it can hardly be said that the desertion is continuing, because there is an obvious obstacle to the other spouse returning; but that position was considered by Lord Merriman P. in *Herod* v. *Herod*[42] in 1939, and that decision has been approved by this court, which has said, in effect, that the question is not: Is the petitioner living in adultery, or has the petitioner been living in adultery during the period of desertion? but: What effect, if any, has that adultery had on the conduct of the opposite party?

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[34] [1924] P. 194, 200.
[35] [1939] A.C. 417.
[36] [1940] A.C. 631.
[37] [1909] P. 123.
[38] [1940] A.C. 631, 642.
[39] [1911] P. 191.
[40] [1940] A.C. 631, 639.
[41] [1911] P. 191, 194.

Coming back to the question as posed by Warrington L.J., the question whether desertion continues is one of fact. Approaching this case in that way, I agree with what the Master of the Rolls has said, that the mere pronouncement of the decree nisi in the present case must be looked at to see what effect, if any, it had on the conduct of the wife. The question of law is, to my mind, out of the way, having regard to the decision of *Cohen* v. *Cohen*.[43] The decree nisi, no doubt, is a further step in the proceeding beyond the mere presentation of the petition, but there is nothing in the decree nisi which corresponds to a decree of judicial separation, in that it brings the marriage to an end, or the duties of cohabitation to an end. The decree nisi is an interlocutory decree, which does not take effect until it has been made absolute. For the reasons which have already been given—I do not propose to go over the unhappy history of this case again—I see no reason to find that the pronouncement of this decree had any effect at all on the wife's conduct.

The argument on her behalf was no doubt supported by a reference to the decision of the House of Lords in the earlier case of *Fender* v. *St. John-Mildmay*,[44] where the question to be determined was whether a contract by a man, after decree nisi and before decree absolute, to marry another woman other than his wife was void as being against public policy or not, so that the question there was very different from that to be determined in the present case. However, the majority of their Lordships' House, reaching a conclusion that such a contract was not against public policy, undoubtedly laid emphasis on the fact that, after decree nisi (to use the graphic language used in one of the speeches), the marriage was just an empty shell and it would be, in effect, absurd to regard the marriage as subsisting in any real sense of the word; but, in Lord Atkin's speech particularly, it is to be observed that most of the arguments which he directed to the absurdity of the situation applied equally to the position after a petition had been presented; indeed, even to the position before a petition had been presented, when a matrimonial wrong had been inflicted by one spouse upon another. It is only, I think, Lord Wright, one of the majority, who laid particular emphasis on the decree nisi and fastened on that moment as being the moment at which it appeared to him that the respondent to the appeal was free to enter into a contract of marriage.

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[42] [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722.

[43] [1940] A.C. 631.

[44] [1938] A.C. 1.

Lord Thankerton used this language[45]: "My Lords, once the "decree nisi has been pronounced the petitioner, as I have already "stated, has done all that he or she can do in order to obtain "dissolution of the marriage tie, except to apply, after expiry "of the statutory period, for the decree absolute. The guilt of the "respondent has been judicially determined. The waiting period "is imposed in the public interest, in order to ensure that there "has been full disclosure before the court. If intervention takes "place and is successful, the decree absolute will not be obtained, "and the promise of marriage will be nugatory." Earlier in his judgment, Lord Thankerton had used this language[46]: "While, "on the one hand, the marriage tie is not dissolved until the "decree is made absolute, and misconduct with a third party still "constitutes adultery, the consortium vitae of the spouses is "suspended from a stage prior to the decree nisi, and the "petitioning spouse has done all he or she can or need do, except, "after the expiry of the necessary period, to apply to have the "decree made absolute."

Lord Wright said[47]: "I have here chosen the decree nisi as "marking the line of division and demarcation. Many of the "above arguments would apply to a mere separation and even "more to the presentment of a petition. But I think a decisive "point is reached by the decree nisi. The petition is merely the "first step in proceedings. The result is uncertain. There is no "public hearing. It is true the parties are, when the petition is "lodged, almost certainly living apart and must live apart while "the petition is pending. But there is nothing final such as there "is in the adjudication and the decree nisi, given in public court "and in the eyes of the world. Before that the charges may fail, "the petition may be compromised, the parties may be reconciled. "The whole position, in my opinion, becomes changed and fixed "by the decree nisi."

That, I think, is the high-water mark of the speeches which can be used in favour of the argument for the wife in this case as showing that their Lordships attached importance to the decree nisi as showing a marked change in the situation between the parties from what it had been before. But I come back again to the opinion expressed by the House of Lords in *Cohen's* case,[48] to the view that, whatever may have been said in the breach of promise case, the question of whether there has been a break or not, brought about by the decree nisi, is a question of fact to be determined in each particular case, and that there is nothing in the pronouncing of a decree nisi which, as a matter of law, affects the position.

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[45] [1938] A.C. 1, 25.

[46] Ibid. 24.

[47] Ibid. 51.

The final question in the present case (which, to my mind, is really the most difficult), has come about almost, as it were, by accident, because the original petition was presented for nullity in October, 1950, and, after the nullity petition had been dismissed by this court on March 12, 1952, it was clearly intended that the husband should have the opportunity of amending his pleading so as to allege desertion, which would have been desertion down to the presentation of the petition in 1950. A good deal of time had elapsed and, when the husband sought leave to amend, the point was taken against him in the registry that if he were given leave to amend, it would have the effect of shutting out from consideration by the court a number of letters which the wife had written to her husband, recent letters, all of which have been read, asking for a reconciliation, which it was said would cause a break in the running of the desertion.

When the matter came before this court, I think that the court, as it was then constituted, must have felt some sympathy with this view, because the parties were persuaded to abandon the proceedings, which were then current, in order that the fresh petition might be presented. The wife had previously asked for a divorce for herself on the ground of desertion. She had, over a period of years, made no attempt to communicate with her husband at all. From the date of the " olive branch " in 1947 (with the exception of a short letter of acknowledgment of a present in 1947 and some malicious letters written under a false name in 1949 to her husband and to her husband's commanding officer) she had not communicated at all with him until 1950, when, at the time the husband was contemplating proceedings against her, she caused a letter to be written to him demanding a separation. The field being cleared by the dismissal of the earlier proceedings, the husband presented his petition in January, 1953, and in order to establish desertion up to that date, of course, he had to cover the period during which the wife's letters were written; and the difficult question which has to be determined is: What weight is to be given to those letters as being offers by the wife to rejoin her husband, which would, having been rejected by him, prevent her from continuing to be a deserter? Mr. Nield has argued with some force that if a letter is written making an offer, which the recipient of the letter takes no notice of at all, it scarcely lies in the mouth of the recipient to say that that letter does not contain an offer when, on the face of it, it does. But that, again, is a question of fact, and the commissioner, who tried this case, as I think, directed himself correctly in considering whether or not these letters, which were written by the wife's solicitors in the first place and later by the wife herself, were to be regarded as offers by her, offers with a view to bringing about a reconciliation between the parties, which would prevent her, if those offers were refused, from being considered to be a deserter.

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[48] [1940] A.C. 631.

The first thing to be noticed about those letters is that they were written after a very long period of silence on the part of the wife, a very long period during which she had made no approach whatever to her husband and during which her attitude towards him was one of hostility, during which she had, as I said just now, asked for a separation by agreement and later asked for a divorce. Moreover, the solicitors' letters merely harked back to the situation as it had been in 1946, when the wife had unreasonably, as I think, and as the commissioner held, insisted on the husband coming back when he could to her at her house, instead of joining him at the married quarters which he would be able to provide. Her attitude, as expressed through the solicitors, was that she would have him back, if he would return to her; not that she would join him. Furthermore, when those efforts met with refusal and she herself wrote letters to her husband personally, not through the solicitors, asking for a meeting with a view to reconciliation, an offer which one would have thought it would have been very difficult for the husband to reject out of hand on the ground that it had no genuine basis, a curious piece of evidence emerged which, I think, entitled the commissioner to take the view that he did, that these were merely moves in the game, to use the language of Bucknill J., as he then was, in another case, a mere stratagem. Light is thrown on this part of the case by the curious fact that, when she did succeed in obtaining an interview with her husband, although he was anxious not to see her, she had an inquiry agent present to watch, to see the meeting take place, apparently in order that the inquiry agent should be called as a witness to prove what had happened, that indeed she had seen her husband, if perchance he should have denied it.

The commissioner, in considering the genuineness of the wife's offers, was, I think, entitled to take into account, as he did, the whole history of the case, beginning from the time when the wife drove her husband from the door, over the period of silence and hostile action, ending with the offers themselves, which I think do (as I have tried to indicate) contain some internal evidence that they were nothing more than what the commissioner called "manoeuvres." They were made at a time when the appeal to this court on the nullity proceedings had been heard and after that appeal had been allowed in the wife's favour, and they culminated in the peculiar incident of October 28, 1952, when the wife met her husband in the street with a view, as she asserted, to pursuing her attempts at reconciliation.

In my judgment, the commissioner was, for the reasons which the Master of the Rolls has given and for those which I have tried to give, entitled to come to the conclusion that there was here no real offer on the part of this woman to this man, no manifestation at any rate of any change of heart, nor any change of attitude towards him, and accordingly the commissioner was entitled to treat those offers as if they had never been made. I agree, therefore, that the appeal fails.

Appeal dismissed.

Solicitors: *Scadding & Bodkin; Bishop & Cooke.*

B. A. B.

END OF VOLUME AND OF PROBATE SERIES FOR 1954.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1954, will be as follows:—

In the First Series,
[1954] Ch. [1954] P.

In the Second Series,
[1954] 1 Q.B. [1954] 2 Q.B.

In the Third Series,
[1954] A.C.

INDEX

ADMINISTRATION. See Conflict of Laws.

ADULTERY—Meaning in law. See Husband and Wife.

ALIMONY. See Husband and Wife.

BARRISTER—Fees. See Legal Aid.

BONA VACANTIA. See Conflict of Laws.

BREACH OF PROMISE OF MARRIAGE. See Husband and Wife.

CONFLICT OF LAWS—*Administration of estates—Intestacy—Deceased domiciled abroad at death—Personal estate in England—Claim of foreign State as ultimus heres—Whether Crown's claim to bona vacantia excluded.*

Bona vacantia.
In the Estate of Maldonado, decd. State of Spain *v.* Treasury Solicitor
Barnard J. 223

2. —— *Contract—Proper law—Charterparty—Bill of lading—Presumptions—Law of flag—Lex loci contractus—Cargo shipped at French port by French charterers and shippers on Italian vessel—Italian consignees—Bill of lading made in Paris in French language—Proper law governing the contract—Intention of the parties to be imputed from all surrounding circumstances—Charterers a Government agency—Circumstances unknown to one party.*

Presumptions.
The Assunzione - - - - **C.A. 150**

CONTRACT—Proper law. See Conflict of Laws.

COSTS—Taxation—Counsel's fees. See Legal Aid.

2. ——. See Legal Aid.

CRUELTY—Financial meanness. See Husband and Wife—Divorce.

CUSTODY—Child born in adultery. See Husband and Wife—Divorce.

DESERTION. See Husband and Wife.

DIVORCE. See Husband and Wife.

DOCK. See Shipping.

DURESS—Nullity. See Husband and Wife.

ECCLESIASTICAL LAW—*Faculty—Ornaments—Removal of illegal ornaments—Reservation of the sacrament in a tabernacle or aumbry—Authority of the bishop—Sanctuary gong and bells—Altar lights and other candle-holders—Incense, thurible and incense boat—Confessional table and chair—Crucifixes and processional cross—Second and third holy tables—Stations of the Cross—Holy water stoup, cruet of holy oil and humoral veil—Statue of the Blessed Virgin Mary with the Child Jesus.*
In re St. Mary, Tyne Dock
Hylton Foster Ch. 369

2. —— *Faculty—Tabernacle—Reservation of Sacrament for the sick—Use of tabernacle as receptacle—Proposed to be placed above altar of Lady Chapel and bolted to wall—Former use of "aumbry" or recess—Reservation sanctioned by bishop—Whether "tabernacle" or "aumbry" illegal church ornaments.*
In re Lapford (Devon) Parish Church
W. S. Wigglesworth Ch. 416

ESTOPPEL—Divorce. See Husband and Wife.

2. ——. See Husband and Wife—Maintenance.

3. —— —— Paternity.

EVIDENCE—Adultery—Onus of proof. See Husband and Wife—Divorce.

HUSBAND AND WIFE—*Divorce—Adultery—Meaning of adultery in law—Manual satisfaction.*
Sapsford *v.* Sapsford and Furtado **Karminski J. 394**

2. —— *Divorce — Cruelty — Financial meanness.*
Eastland *v.* Eastland - **Karminski J. 403**

3. —— *Divorce—Custody—Child born in adultery—Subsequent marriage and divorce of parents—Question of jurisdiction to order custody or maintenance—Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).
Parker *v.* Parker - - - **C.A. 15**

4. —— *Divorce—Desertion—Dismissal of previous charge of cruelty upon similar facts.*
Foster *v.* Foster - - - **Divl.Ct. 67**

5. —— *Divorce—Desertion—Termination—Husband deserted in* 1946*—Decree nisi of nullity granted to husband—Decree revoked on appeal—Whether desertion terminated by decree—Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*b*).
W. *v.* W. (No. 2) - - - **C.A. 486**

6. —— *Divorce—Estoppel—Res judicata—Previous cruelty petition dismissed—Charges held trivial—Similar allegations raised as defence to petition for desertion. Estoppel—Per rem judicatam.*
Hill *v.* Hill - - - **Davies J. 291**

7. —— *Divorce — Estoppel per rem judicatam—Previous petition alleging cruelty and adultery dismissed—Second petition alleging desertion — Unreasonable delay — Petitioner resident abroad—Fruitless proceedings.*

Divorce. Estoppel (per rem judicatam).
Bright *v.* Bright - - **Willmer J. 270**

8. —— *Divorce — Evidence — Adultery — Evidence of participator — Warning — Corroboration — Onus of proof — " Satisfied " — Beyond reasonable doubt—Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 4.
Galler *v.* Galler - - - **C.A. 252**

9. —— *Divorce — Incurable insanity — Detention as temporary patient—Subsequent admission as voluntary patient—Short absence on trial—Notice of discharge signed in error during absence—Discharge a nullity—Mental Treatment Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 23), *s.* 5 (14)*—Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *ss.* 1 (1) (*d*), 2 (*a*), (*d*)*—Mental Treatment Rules,* 1930 (*S.R. & O.* 1930, *No.* 1083), *rr.* 5, 39.
Wyatt *v.* Wyatt - - **Karminski J. 26**

HUSBAND AND WIFE—*continued.*

10. —— *Divorce — Paternity — Estoppel — Decree on ground of adultery—Paternity " not " admitted "—Whether res judicata—Legitimacy—Presumption—Use of contraceptives at time of conception—Paternity issue—Practice—Plaintiff—Burden of proof.*
Watson *v.* Watson - - **Barnard J. 48**

11. —— Divorce—Paternity. See Legitimacy.

12. —— *Divorce—Procedure—Service of petition—Absence of appearance—Respondent an infant — Mandatory nature of rules — Matrimonial Causes Rules,* 1950 (*S.I.* 1950, *No.* 1940/*L.* 27), *r.* 64 (3), (9).
Stanga *v.* Stanga - - - **Divl.Ct. 10**

13. —— *Divorce—Procedure—Service of petition—Absence of appearance—Respondent of unsound mind—Mandatory nature of rules—Matrimonial Causes Rules,* 1950 (*S.I.* 1950, *No.* 1940/*L.* 27), *r.* 64 (5), (9).
Gore-Booth *v.* Gore-Booth - **Divl.Ct. 1**

14. —— *Divorce—Re-hearing—Jurisdiction of Divisional Court—No entry of appearance—No appeal " in ordinary course " to Court of Appeal—Possible " error of the court "—Matrimonial Causes Rules,* 1950 (*S.I.* 1950, *No.* 1940), *r.* 36 (1).
Skull *v.* Skull - - - **Divl.Ct. 458**

15. —— *Divorce—Residence—" Ordinarily " resident " in England—Temporary absence—Jurisdiction—Matrimonial Causes Act,* 1950 (14 *Geo.* 5, *c.* 25), *s.* 18 (1) (*b*).

Residence.
Stransky *v.* Stransky - **Karminski J. 428**

16. —— *Divorce — Service of petition — Application to dispense with service—Respondent a political prisoner—Discretion—Matrimonial Causes Rules,* 1950 (*S.I.* 1950, *No.* 1940), *r.* 9 (5).
Spalenkova *v.* Spalenkova **Willmer J. 141**

17. —— *Divorce—Settlement of wife's property for benefit of husband—Court's power to antedate effect of settlement—Drafting of settlement by conveyancing counsel—Inapplicability of R.S.C., Ord.* 51, *r.* 7*—Matrimonial Causes Rules,* 1950, *r.* 80 *— Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 24 (1).

Husband and Wife — Maintenance — High Court. Divorce — Practice — Applicability of R.S.C.
Style *v.* Style and Keiller
Barnard J. 209

18. —— *Divorce—Variation of settlement—Variation to reduce income tax payable—*

HUSBAND AND WIFE—*continued.*

Power of Divorce Court—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 25.

Settlement — Marriage settlement. Revenue —Tax avoidance scheme.
THOMSON *v.* THOMSON AND WHITMEE **Davies J. 384**

19. —— *Justices—Desertion—Constructive desertion — Reasonable belief in adulterous association.*
BAKER *v.* BAKER - - - **Divl.Ct. 33**

20. —— *Justices — Practice — Provision of reasons—Time for—Notice of appeal not filed —Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940), *r.* 71 (3).
PADLEY *v.* PADLEY - - - **Divl.Ct. 302**

21. —— *Maintenance—High Court—Jurisdiction—Parties judicially separated—Wife's application for secured maintenance—Meaning of "jurisdiction" in Matrimonial Causes Act*, 1950 (14 *&* 15 *Geo.* 6, *c.* 25), *s.* 23.
KING *v.* KING - - - - **C.A. 55**

22. —— *Maintenance—High Court—Wilful neglect to maintain—Alimony—No power to grant alimony pending suit — Matrimonial Causes Act*, 1950 (14 *&* 15 *Geo.* 6, *c.* 25), *ss.* 19 (1), 20 (1), 22 (1), 23; *Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940), *r.* 56.

Husband and Wife—Alimony pendente lite.
S-(D.A.) *v.* S-(J.D.) - **Collingwood J. 194**

23. —— *Maintenance—High Court—Wilful neglect to maintain — Husband's petition containing serious allegations dismissed — Subsequent offer of reconciliation refused by wife—Absence of just cause for refusal—Whether reconciliation offer genuine—Reconciliation not desired.*
DYSON *v.* DYSON - - **Barnard J. 198**

24. —— *Maintenance—High Court—Wilful neglect to maintain—Order of the High Court —Power to date payments from issue of summons—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23—*Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940), *r.* 56 (10).

Maintenance—Power to date payments from issue of summons.
McLELLAN *v.* McLELLAN - **Karminski J. 138**

25. —— *Maintenance—High Court—Wilful neglect to maintain — Reasonable belief in wife's adultery—Husband's petition for divorce founded on adultery dismissed — Whether husband guilty of wilful neglect to provide maintenance before petition dismissed—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23 (1).
WEST *v.* WEST - - - - **C.A. 444**

26. —— *Maintenance — Justices — Adultery by wife—Evidence—Discharge of order—Evidence of association before order—Estoppel—Res judicata—Summary Jurisdiction (Married Women) Act*, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7.
ROBERTS *v.* ROBERTS - - - **C.A. 472**

27. —— *Maintenance—Justices—Neglect to maintain child only—Power to award maintenance to wife—Desertion—Consent to separation on basis of maintenance continuing—Wife's willingness for husband to go—Married Women (Separation and Maintenance) Acts*, 1895–1949.
KINNANE *v.* KINNANE - - **Divl.Ct. 41**

28. —— *Maintenance—Justices—Re-hearing —Wife's summons dismissed—Appeal to Divisional Court allowed—Power of justices to ante-date payments on re-hearing as to amount—Committal order for subsequent arrears—Effect of order—Refusal of Divisional Court to order payments prior to date fixed by justices—Magistrates' Courts Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 64, 74, 75, 76.
STARKEY *v.* STARKEY - - **Divl.Ct. 449**

29. —— *Marriage—Capacity to enter into marriage contract—Requisites—Previous probate action—Party sued as "widow"—Jury's finding that deceased mentally incapable of executing will made on marriage day — Estoppel—Jury's finding not binding on court considering mental capacity to marry.*
PARK *v.* PARK - **Karminski J. and C.A. 89**

30. —— *Nullity — Duress — Marriage to escape from Hungary — Fear of political danger—Question of validity.*
H. *v.* H. - - - **Karminski J. 258**

31. —— *Restitution of conjugal rights—Divorce—Petition—Prayer for dissolution in answer alleging cruelty—Whether separate petition necessary—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 32—*Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 6.
BARBER *v.* BARBER - - - **C.A. 438**

INFANT—*Custody—Divorce court—Child born in adultery—Not legitimated by subsequent marriage of parents—Divorce—No jurisdiction to order custody—"Children the marriage of "whose parents is the subject of the proceed- "ings"—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).

Statute — Construction — Re-enactment of section—Judicial opinion expressed meanwhile as to meaning—"Children"—Prima facie meaning "legitimate children."
GALLOWAY *v.* GALLOWAY - - **C.A. 312**

INSANITY. See HUSBAND AND WIFE—Divorce.

JUSTICES—Provision of reasons. See HUSBAND AND WIFE.

2. ——. See HUSBAND AND WIFE.

LEGAL AID—*Costs—Divorce—Attendance of respondent at hearing—Respondent resident abroad—Payment on account of disbursements for his attendance—Legal Aid and Advice Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *Sch. III—Legal Aid (General) Regulations*, 1950 (*S.I.* 1950, *No.* 1359), *reg.* 14 (6A)—*Legal Aid (General) (Amendment No.* 1) *Regulations*, 1954 (*S.I.* 1954, *No.* 166), *para.* 23—*Legal Aid Scheme*, 1950, *para.* 33.

Practice — Evidence taken before trial — Divorce—Husband respondent resident in Cyprus—Application for his evidence to be taken before special examiner there.
AMMAR *v.* AMMAR - - - **Sachs J. 468**

2. —— *Costs—Taxation—Barrister — Brief fee—Case heard out of London—Availability of local counsel—Employment of London barrister — Appropriate fee — Undefended divorce case—Legal Aid and Advice Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 6 (4), *Sch. III.*

Barrister—Fees.
SELF *v.* SELF - - - - **Sachs J. 480**

LEGITIMACY — *Presumption — Paternity issue—Wife's association with co-respondent—Subsequent birth of child—Husband and wife sleeping together — Whether presumption of legitimacy rebutted—Husband's evidence of no intercourse—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 32 (1).

Husband and Wife—Divorce—Paternity—Rebuttable presumption.
COTTON *v.* COTTON - - - **C.A. 305**

MAINTENANCE—High Court. See HUSBAND AND WIFE.

2. —— Jurisdiction of High Court. See HUSBAND AND WIFE.

3. —— Wilful neglect. See HUSBAND AND WIFE.

MARRIAGE — Capacity. See HUSBAND AND WIFE.

NULLITY—Duress. See HUSBAND AND WIFE.

PRACTICE — Evidence before Trial. See LEGAL AID.

PRACTICE—*continued.*

2. —— Justices' Reasons. See HUSBAND AND WIFE.

3. —— Service of Petition. See HUSBAND AND WIFE—Divorce.

PRIVATE INTERNATIONAL LAW. See CONFLICT OF LAWS.

RES JUDICATA—Divorce. See HUSBAND AND WIFE.

2. ——. See HUSBAND AND WIFE—Maintenance.

RESIDENCE—" Temporary absence." See HUSBAND AND WIFE—Divorce.

RESTITUTION OF CONJUGAL RIGHTS. See HUSBAND AND WIFE.

REVENUE—Tax avoidance. See HUSBAND AND WIFE.

SETTLEMENT—Variation. See HUSBAND AND WIFE.

SHIPPING—*Limitation of liability—Expenses of raising vessel — Whether "injury or "damage"—Harbours and docks — Obstruction to navigation of canal by sunken barge—No physical damage or injury to harbour works —Liability of barge owners for expenses incurred by canal company in removing obstruction—Whether right to limit liability —Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503—*Harbours, Docks and Piers Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 27), *ss.* 56, 74 — *Merchant Shipping (Liability of Shipowners and Others) Act*, 1900 (63 *&* 64 *Vict. c.* 32), *ss.* 1, 3—*Manchester Ship Canal Act*, 1897 (60 *&* 61 *Vict. c. cviii*), *s.* 9—*Manchester Ship Canal Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c. cxxiv*), *s.* 32 (1) (2).

Dock. Statute.
STONEDALE No. 1. OWNERS *v.* MANCHESTER SHIP CANAL CO. THE STONEDALE No. 1.
C.A. 338

STATUTE—Construction. See INFANT.

VARIATION OF SETTLEMENT. See HUSBAND AND WIFE.

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